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September 9, 2011

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VIA EMAIL AND FEDEX

Mr. Valmichael Leos, EPA Project Coordinator
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Ms. Barbara A. Nann, Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 6
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642059

Re: Administrative Settlement Agreement and Order on Consent for Removal Action between the United States Environmental Protection Agency ("EPA"), McGinnes Industrial Maintenance Corporation and International Paper Company, San Jacinto River Waste Pits Site (the "Site"), U.S. EPA Region 6 CERCLA Docket No. 06-12-10 ("AOC") – Submission in Response to Letter dated February 16, 2011 and in Support of *Force Majeure* Claim and Claim for Interference and Breach of Contract

Dear Mr. Leos and Ms. Nann:

Enclosed with this letter is a submission ("Submission") being made on behalf of Respondents International Paper Company ("International Paper") and McGinnes Industrial Maintenance Corporation ("MIMC"). The Submission relates to Respondents' efforts to obtain access for purposes of performing the time critical removal action ("TCRA") at the Site, which they agreed to perform pursuant to the terms of the AOC. As you know, construction of the TCRA (construction of an armor cap over waste impoundments at the Site) was completed in mid-July.

Pursuant to letters dated December 30, 2010, January 4, 2011, January 5, 2011, and January 28, 2011, Respondents notified EPA of *force majeure* events in accordance with the AOC. These events constituted the inability of Respondents to obtain access agreements from the Texas Department of Transportation ("TxDOT") and Big Star Barge & Boat Company, Inc. ("Big Star") in support of their proposed work under the approved Removal Action Work Plan, despite their best efforts to do so.

Notwithstanding their *force majeure* claim, however, Respondents continued their efforts to obtain access from TxDOT and to locate alternatives to the Big Star property and proceeded with construction of the time critical removal action ("TCRA") under the AOC, as soon as the impasse over access that was the basis for their *force majeure* claims was resolved. As you know, Respondents took steps to accelerate the construction process and were able to complete TCRA construction in mid-July, ahead of the completion date that was proposed before the *force majeure* events occurred. This was a considerable accomplishment in view of EPA's affirmative acts which prevented Respondents from gaining access. It was only after the obstacles created by EPA were removed that the work was able to commence.

The Submission responds to the February 16, 2011 letter in which EPA denied Respondents' force majeure claims ("February 16 Letter"). Respondents previously notified EPA that they disputed its denial of their force majeure claims, and the Submission is intended to supplement that notice of dispute.[1] The Submission also addresses Respondents' claims regarding EPA's undue interference with Respondents' access efforts and breach of its obligations of good faith and fair dealing under the AOC related to access.

The Submission further addresses the issue of stipulated penalties associated with construction of the TCRA. In the February 16 Letter and elsewhere, EPA has taken the position that Respondents are subject to stipulated penalties under the AOC for alleged failure to meet deadlines in a construction schedule for the TCRA. Earlier this year, EPA issued several notices of violation ("NOVs") to Respondents regarding their alleged failure to meet various deadlines under the AOC and stating that they were subject to stipulated penalties. Respondents previously responded and invoked dispute resolution with respect to each of the NOVs and the February 16 Letter, although pursuant to Ms. Nann's letter dated March 11, 2011, Respondents understand EPA's position to be that any dispute resolution process with respect to the NOVs is premature until such time as EPA seeks to assess stipulated penalties on Respondents.

EPA recently sent a letter to Respondents' TCRA Project Coordinator, Anchor QEA ("Anchor"), dated August 5, 2011 and received by Anchor on August 11, 2011 ("August 5 Letter"). The August 5 Letter identifies instances of alleged non-compliance with the AOC related to the TCRA construction process and Respondents' alleged failure to meet deadlines in a construction schedule that EPA purported to "approve" and now seeks to use as the basis for seeking stipulated penalties. The August 5 Non-Compliance Letter incorporates matters addressed in the NOVs as well as identifying additional alleged instances of non-compliance. The alleged instances of non-compliance identified in the August 5 Letter arise out of the inability to obtain access that was the subject of Respondents' *force majeure* claims and are addressed in the Submission. Separate from and in addition to the matters raised in the enclosed Submission, Respondents are separately responding and invoking dispute resolution with respect to the instances of alleged non-compliance addressed in the August 5 Letter.

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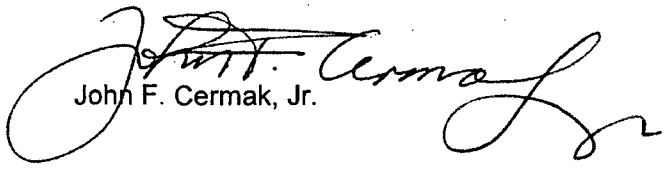
[1] Respondents notified EPA in a letter dated March 18, 2011 that they were disputing the conclusions in the February 16 Letter pursuant to applicable provisions of the AOC. The Submission is intended to supplement that notice of dispute.

Respondents worked cooperatively with EPA and other interested parties to complete the TCRA work (and in the process met each of the "compliance milestones" identified in the AOC), and did so in a thorough, professional and timely manner. It is Respondents' hope that EPA will not proceed to seek to assess stipulated penalties under the AOC. However, in light of the recent receipt of the August 5 Letter, Respondents regard the enclosed Submission to be necessary in order to respond to factual misstatements regarding the underlying events that are contained in EPA's February 16 Letter and to summarize the extensive record regarding events surrounding their force majeure claims so that they are clearly included in the administrative record.

Respondents are providing with and as part of the Submission an appendix of documents related to their access efforts and the matters addressed in the Submission ("Appendix"). The Appendix consists of six volumes, which are being provided to you in electronic form with the original of this letter. The six volumes of Appendix documents are also being forwarded to you in hard copy. The index identifying the documents contained in the Appendix is being provided to you with this letter. Respondents request that the Submission, together with the Appendix, be included in the administrative record with respect to the AOC and the Site.

Any questions regarding the Submission should be directed to me and to MIMC's counsel.

Sincerely,



John F. Cermak, Jr.

Enclosures

cc: Samuel Coleman, EPA Division Director, Superfund Division
Donald Williams, EPA Deputy Associate Director, Superfund Division
Jessica Hernandez, EPA Regional Counsel
Anne Foster, EPA Regional Counsel
Albert R. Axe, Counsel for MIMC

SUBMISSION OF RESPONDENTS MCGINNES INDUSTRIAL MAINTENANCE CORPORATION AND INTERNATIONAL PAPER COMPANY IN RESPONSE TO LETTER DATED FEBRUARY 16, 2011 AND IN SUPPORT OF *FORCE MAJEURE* CLAIM AND CLAIM FOR INTERFERENCE WITH AND BREACH OF CONTRACT

September 9, 2011

ADMINISTRATIVE SETTLEMENT AGREEMENT
AND ORDER ON CONSENT FOR REMOVAL ACTION
BETWEEN
THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, MCGINNES INDUSTRIAL MAINTENANCE CORPORATION AND INTERNATIONAL PAPER COMPANY,
SAN JACINTO RIVER WASTE PITS SITE,
U.S. EPA REGION 6 CERCLA DOCKET NO. 06-12-10

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LIST OF ABBREVIATIONS OF SELECTED TERMS

ABBREVIATION	PAGE	DESCRIPTION
Alternative Site Search Statement	8	Statement prepared by Respondents describing their efforts to locate alternative locations to the Big Star property for material and equipment storage, construction offices, and marine access for the TCRA. It is Item 29 of the Appendix to this Submission.
AOC	1	Administrative Settlement Agreement and Order on Consent for Removal Action for the TCRA which was effective as of May 17, 2010.
Appendix	8	Five volume appendix containing documents relied upon by Respondents in support of this Submission.
Big Star	1	Big Star Barge & Boat Company, Inc.
Big Star Chronology	8	Chronology of Respondents' efforts to obtain access from Big Star in connection with activities related to the Site. It is Item 28 of the Appendix to this Submission.
Big Star Consent	34	Consent to Access that was signed by Big Star in February 2010 and subsequently amended by the terms of several addenda, as addressed in the Big Star Chronology.
CAC	28	Community Awareness Committee established by EPA with respect to the Site.
Construction Schedule	7	Construction schedule for the TCRA, based on a combined land and water access scenario, that was approved by EPA on December 15, 2011.
December Log	4	Log of daily activities related to access during December 2010 that was submitted to EPA as an enclosure to Respondents' January 5, 2011 letter to EPA regarding their access efforts. The letter is Item 18 of the Appendix to this Submission.
Dispute Notices	7	Letters submitted by Respondents to EPA in which Respondents invoked dispute resolution under the AOC with respect to the NOVs. The letters are included in the Appendix as Items 23, 24 and 26.
Eastern Cell	5	Portion of the waste impoundments at the Site, referred to by EPA in the February 16 Letter as the "eastern pit."

ABBREVIATION	PAGE	DESCRIPTION
February 16, Letter	1	EPA letter dated February 16, 2011 rejecting Respondents' *force majeure* claim.
FHA	20	Federal Highway Administration
HIT	33	Houston International Terminal, a sister company to Big Star
I-10	3	Interstate Highway 10
January 21 Memorandum	6	Memorandum dated January 21, 2011 prepared by EPA's TCRA Project Manager and enclosed with the February 16 Letter, responding to issues raised by Respondents regarding the viability of and risks associated with performing the TCRA via water only access, as opposed to utilizing a "combined" access scenario
Laydown Area	3	The area on the Big Star property that Respondents proposed to use to store construction material, to store equipment used in TCRA construction offices, and to house administrative offices for the TCRA construction.
List	1	An attachment to this Submission which identifies misstatements contained in the February 16 Letter.
Log Comments	5	Document prepared by EPA and enclosed with the February 16 Letter, responding to the December Log.
NOVs	3	Letters from EPA dated January 14, 2011, January 21, 2011, January 24, 2011 and March 3, 2011 alleging violations of the AOC. The letters are included in the Submission as Items 19 to 21 and 25.
RAWP	2	Removal Action Work Plan for the TCRA.
Respondents' Position Regarding December Access Efforts	8	Document prepared by Respondents in response to EPA's Log Comments and included as Item 31 of the Appendix to this Submission.
ROW	1	Right of way on property owned by TxDOT that adjoins and provides the only means of land access to the waste impoundments at the Site, the location of which is shown on the map that is Item 1 of the Appendix.
TCRA	1	Time Critical Removal Action for the Site that Respondents, pursuant to the AOC, agreed to perform.

ABBREVIATION	PAGE	DESCRIPTION
Technical Response	6	Document prepared by Respondents' technical team that addresses EPA's January 21 Memorandum. It is Item 30 in the Appendix to this Submission.
Turnaround Area	31	An area on the TxDOT ROW that TxDOT agreed to allow Respondents to use to turnaround equipment as part of Respondents' construction activities for the TCRA.
TxDOT	1	Texas Department of Transportation.
TxDOT Chronology	8	Chronology of Respondents' efforts to obtain access from TxDOT in connection with activities related to the Site. It is Item 27 of the Appendix to this Submission.
TxDOT Unilateral Version	27	An access agreement for TxDOT ROW containing terms unilaterally set by TxDOT that TxDOT submitted to EPA on November 30, 2010, at the request of EPA's counsel. It is included in Item 18 of the Appendix to this Submission (January 5, 2011 Best Efforts Letter), as Exhibit 1 to the December Log attached to the letter.
UAO	15	Unilateral Administrative Order for Remedial Investigation and Feasibility Study for the Site, issued to Respondents on November 20, 2009.
USA Environment	11	USA Environment LLP, Respondents' TCRA construction contractor.
Western Cell	6	Portion of the waste impoundments at the Site, referred to in the February 16 Letter as the "western water pit" or the "western pit."

I. INTRODUCTION.

This submission ("Submission") is made by McGinnes Industrial Maintenance Corporation ("MIMC") and International Paper Company ("International Paper, and collectively with MIMC, "Respondents"). Respondents are parties to that certain Administrative Settlement Agreement and Order on Consent for Removal Action ("AOC") with the United States Environmental Protection Agency ("EPA") for the San Jacinto River Waste Pits Superfund Site ("Site"). Under the AOC, Respondents agreed to perform (and have performed) a time critical removal action ("TCRA") at the Site, construction of which was recently completed ahead of schedule.

Respondents were delayed in being able to proceed with certain construction activities related to the TCRA due to their inability to timely obtain access, despite using their "best efforts" to do so. Respondents made a *force majeure* claim regarding their inability to obtain access ("*Force Majeure* Claim"). EPA, in a letter dated February 16, 2011 ("February 16 Letter"), rejected the *Force Majeure* Claim and claimed that Respondents had "ceased work" on the TCRA. EPA has also, in the February 16 Letter and in other correspondence - most recently in a letter dated August 5, 2011 ("August 5 Letter") - asserted that Respondents are subject to stipulated penalties under the AOC for allegedly failing to meet certain interim deadlines in a construction schedule for the TCRA. EPA has taken this position, notwithstanding Respondents' completion of TCRA construction (construction of an "armor cap" over the waste impoundments at the Site) ahead of schedule and notwithstanding that Respondents have met each and every one of the "Compliance Milestones" identified as a basis for stipulated penalties in the AOC.

This Submission addresses why EPA has improperly denied the *Force Majeure* Claim. It also:

- describes how EPA's actions related to access interfered with and prevented Respondents from obtaining access, which interfered with and frustrated the purpose

of the AOC and breached EPA's covenant of good faith and fair dealing under the AOC (hereinafter, "Breach of Contract Claim"); and

- addresses why EPA has no basis under the AOC for seeking to subject Respondents to stipulated penalties for alleged delay in not meeting construction milestones associated with the TCRA.

This Submission also addresses the series of misstatements and mischaracterizations of events contained in the February 16 Letter and relied upon by EPA to justify its denial of the *Force Majeure* Claim and its contention that Respondents are subject to stipulated penalties. Those misstatements and mischaracterizations are identified in an attachment to this Submission ("List").

As a preface to the discussion of the above issues, it is important to focus on the salient facts regarding Respondents' access efforts in connection with the TCRA. Those facts are:

- **Respondents were diligent in seeking land access needed to perform the TCRA.** Respondents engaged in a months-long effort to gain access. In order to gain access, they agreed, in the case of access to the Texas Department of Transportation ("TxDOT") right of way ("ROW"), to (1) remediate historical contamination on the ROW, both adjacent to the waste impoundments and on the other side of the San Jacinto River, (2) remove miscellaneous trash from the ROW, (3) indemnify TxDOT against future contamination and personal injury claims, and (4) take on other commitments unrelated to use of the ROW for a road. In an effort to gain access to the property owned by Big Star Barge & Boat Company, Inc. ("Big Star") adjoining the waste impoundments, they offered to pay rent for the use of the property (notwithstanding the evidence they had presented to EPA that Big Star should be named as a potentially responsible party ("PRP") at the Site) and also agreed to make a significant upfront payment to cover Big Star's legal expenses.

- **EPA's actions - in particular, EPA's embrace of the unreasonable terms on which both TxDOT and Big Star sought to condition access – contributed significantly to the impasse over access.** EPA invited TxDOT and later Big Star to unilaterally set the terms on which each would grant access by sending signed access agreements to EPA. EPA then "convey[ed] agreement" to the terms set by TxDOT (including indemnities for liabilities associated with contamination on the ROW that, among other things, extended to TxDOT's past and future negligent, grossly negligent and willful conduct) and refused to reject Big Star's demand, in addition to rent, for a full release of Respondents' claims against Big Star, broad and overreaching indemnities and an agreement to remediate contamination on Big Star's property irrespective of responsibility for such contamination. This caused TxDOT and Big Star to refuse further negotiations with Respondents regarding the objectionable terms, leading to the *force majeure* event. EPA's actions thus frustrated the purpose of the

AOC and interfered with Respondents' ability to gain access, and constituted a breach of EPA's obligations of good faith and fair dealing under the AOC.

- **EPA has improperly sought to justify its interference with Respondents' access efforts by insisting – without technical or legal justification - that Respondents were obligated, if they could not obtain land access, to perform the TCRA entirely via the water and on the same schedule that had been developed assuming land access.** Once TxDOT and Big Star unilaterally set the terms on which they would grant access, EPA took the position that Respondents' "best efforts" under the AOC to obtain access were no longer relevant. EPA then threatened Respondents with stipulated penalties if they did not either (1) accept those access terms, which, in fact, are ones that EPA itself, under its guidance, would not include in its own access agreements, or (2) perform the TCRA entirely via the San Jacinto River. "Water only" access, however, was an alternative that EPA's counsel had interjected, over Respondents' objections, into the removal action work plan ("RAWP") for the TCRA. EPA did so without ever meaningfully recognizing or evaluating the environmental, health and safety risks it entailed or the delay it would cause in completing the TCRA.

- **The course of action pursued by Respondents – of continuing to seek access even after making their *Force Majeure* Claim and securing such access by late January – allowed the TCRA to be completed in the most expeditious manner.** Thus, Respondents' approach allowed the work to proceed much more quickly than would have been the case if the work had been performed via "water only" access. In fact, the work was completed weeks in advance of the completion date in the original TCRA construction schedule.

II. SUMMARY OF RESPONDENTS' POSITION.

A. EPA Improperly Rejected Respondents' *Force Majeure* Claim.

The February 16 Letter first mischaracterized and then improperly rejected Respondents' *Force Majeure* Claim. In doing so, EPA dismissed the circumstances that precipitated the *force majeure* event, including its own actions (both in interfering with Respondents' access negotiations and in taking the position that "water only" access was a viable alternative for performing the TCRA).

The February 16 Letter mischaracterized Respondents' *Force Majeure* Claim in two respects. First, it mischaracterized the *Force Majeure* Claim as seeking to relieve Respondents of all of their obligations under the AOC. In fact, Respondents were only seeking relief based on the delay in obtaining access – despite their "best efforts" – for about a

one month period from late December 2010 to early February 2011. Second, it mischaracterized the *Force Majeure* Claim as applying only to access to the TxDOT ROW, when in fact it was also made with respect to access to the Big Star property for a material laydown and equipment storage area ("Laydown Area") and marine access.

Respondents' inability to timely obtain access was an "event arising from causes beyond Respondents' control," within the meaning of Paragraph 72 of the AOC. It occurred after Respondents spent months and devoted significant resources to gaining access, and was the result of the unreasonable and improper terms demanded as a condition of access by TxDOT and Big Star. The period of the delay was from late December 2010 until early February, when EPA approved Respondents' amended construction plans. Those amended construction plans were based on Respondents having obtained access from TxDOT and having made alternative arrangements relative to activities that were originally planned to be conducted on the Big Star property. During that time, Respondents continued to perform all of the tasks required pursuant to the RAWP to the extent they could do so without access; they never "ceased work."

The impasse was only broken after TxDOT agreed to withdraw its demand for indemnification for its own gross negligence and willful conduct and Respondents were able to make alternative arrangements for activities planned for the Big Star property, an effort that included (1) leasing the LaBarge property, two miles north of the Tract, for marine access and material storage, (2) leasing a location south of Interstate Highway 10 ("I-10") for an "administration site," (3) adding an equipment laydown, material storage area and truck turnaround area to the TxDOT access agreement, and (4) making arrangements with rock and concrete suppliers to store materials at their facilities.

The February 16 Letter improperly rejected Respondents' *Force Majeure* Claim for the following reasons:

- **First, EPA had no factual basis for concluding that Respondents "ceased work" under the TCRA or for rejecting the *Force Majeure* Claim on the basis that Respondents had purportedly stopped work.** As discussed in Section V below, Respondents were unable to proceed with certain tasks on January 4, 2011 on account of the impasse over access. They were at the same time, however, continuing with all of the tasks that they could perform and simultaneously seeking a resolution of the impasse over access.

- **Second, EPA *incorrectly concluded* that Respondents' access efforts were insufficient to satisfy the requirement that a party relying upon a *force majeure* event demonstrate "best efforts" to meet the obligation.** EPA reached this incorrect conclusion by relying on its own misunderstandings or misstatements (detailed below and summarized in the List) regarding Respondents' efforts to obtain access, dismissing the diligent, months-long efforts and resources that Respondents devoted to obtaining access, and ignoring the role its own actions - constituting a breach of its obligations to Respondents under the AOC - played in frustrating Respondents' efforts to obtain access.

  EPA attributed Respondents' inability to obtain access from TxDOT to an "incremental" approach Respondents purportedly adopted in seeking access, as well as delays and a "lack of urgency" on Respondents' part. In the case of Big Star, EPA attributed Respondents' inability to obtain access to "poor allocation of resources" and Respondents' purported refusal to compensate Big Star for the use of its property. EPA's conclusions regarding Respondents' access efforts are wrong and are based on a series of inaccurate (or in some instances, untrue) statements, identified in the List, regarding the underlying facts. By way of example:

EPA CLAIM	FACT
Respondents' failure to obtain access from TxDOT was due to their decision to pursue an "incremental" approach in seeking access from TxDOT. February 16 Letter at 5.	Respondents pursued a "combined" agreement with TxDOT that would provide access for soil sampling on the ROW and for construction of a road, and did so at EPA's express direction and with its approval. They only changed to an "incremental" approach after being directed by EPA to do so. Ms. Nann, who authored the February 16 Letter, was the person who directed Respondents to take that approach over Respondents' objections.
EPA never "approved" the unreasonable access terms demanded by TxDOT. February 16 Letter at 7.	While EPA denies it "approved" the indemnities demanded by TxDOT, it apparently does not dispute that its counsel, Ms. Nann, stated in an early December 2010 email that "EPA has already *conveyed to TxDOT agreement with the TxDOT language*." (emphasis added.) The February 16 Letter does not explain how "conveying agreement" is inconsistent with or different

EPA CLAIM	FACT
	from "approval." Moreover, EPA acknowledged as part of the February 16 Letter that EPA representatives had a call "with TxDOT on 12/6/10 to discuss the language. Upon review of the language, *EPA does not have an issue with the language* . . ." (emphasis added).[1]
Respondents' efforts to obtain access from Big Star failed because Respondents insisted that Big Star grant free use of its property because it had liability as a PRP at the Site. February 16 Letter at 5.	Respondents regard Big Star to be a PRP at the Site (based on documentation showing that dredging conducted from its property in the late 1990s under a permit issued to a sister company had undermined the waste impoundments). They have long been frustrated by EPA's continuing refusal to address Big Star's liability. But as part of the access negotiations, Respondents did offer Big Star reasonable compensation for the short term use of its property. Big Star, however, in addition to fair compensation also demanded (1) a full release from Respondents, (2) an agreement by Respondents to remediate contamination on the Big Star property, and (3) broad indemnities. Those unreasonable demands, and not Respondents' alleged failure to offer compensation, to Big Star, were why access negotiations with Big Star failed.

Moreover, as demonstrated in the discussion below (in Sections VI to VII), Respondents engaged in diligent and far-reaching efforts to obtain the required access rights which more than satisfied the requirement that they use "best efforts."

- **Third, EPA based its rejection of the *Force Majeure* Claim on the erroneous conclusion that delay in obtaining access would impact only a portion of the TCRA work**. The February 16 Letter states that the *Force Majeure* Claim is irrelevant to work on the "eastern pit" (referred to in the RAWP as the "Eastern Cell") because that work was always planned to be performed exclusively via the water. February 16 Letter at 3 and 8. EPA's characterization of the work on the Eastern Cell is simply wrong. In fact, EPA approved plans showing that only a portion of the work on the Eastern Cell was to be performed via the water.

- **Fourth, relying upon the erroneous "fact" that the *Force Majeure* Claim did not apply to work on the Eastern Cell, EPA then concluded that "water only" access would involve minimal and easily mitigated environmental, health and safety risks and would not delay completion of the TCRA**. Neither of EPA's conclusions is technically supportable. As discussed in Sections IX and X below, the actual facts are:

[1] This statement is contained in a document attached to the February 16 Letter that comments on a log submitted by Respondents describing their access efforts during December 2010. EPA's document is defined and referred to later in this letter as the "Log Comments."

- less than half of the work planned for the Eastern Cell was ever planned to be performed from the water;[2]

- performing the work entirely from the water as compared to, a combined water and land access scenario (as originally planned) would require larger marine equipment and involve logistical challenges that EPA has failed to take into account;

- performing the work entirely form the water would add months to the time required for construction and would entail significantly greater environmental, health and safety risks;

- the mitigation measures planned for the water work on the Eastern Cell would never be sufficient to address the impacts associated with "water only" access to perform work on the other waste impoundment (referred to in the February 16 Letter as the "western pit" and in the RAWP as the "Western Cell"); and

- even in a water access only scenario, the Respondents did not have access to a staging area for marine vessels, construction equipment, and construction materials without access to the Big Star property.

EPA enclosed with the February 16 Letter a memorandum dated January 21, 2011 ("January 21 Memorandum") in which EPA addressed - and largely dismissed - risks associated with a "water only" access scenario. Respondents are submitting with this letter a technical response to the January 21 Memorandum ("Technical Response"). The Technical Response demonstrates the delays and impacts that would have resulted had Respondents been required to perform the TCRA relying only on water access.

- **Fifth, Respondents are not precluded from making their *Force Majeure* Claim (and certainly not their Breach of Contract Claim) by virtue of having contemplated that "water work" would be required when they entered into the AOC**. As discussed in Section XI, what Respondents understood when they signed the AOC was that they were obligating themselves to use "best efforts" to obtain access; they never agreed or expected that EPA would frustrate the purpose of the AOC by interjecting into the TCRA the technically infeasible and risky option of "water only" access or by interjecting itself into access negotiations.

The reasons why EPA improperly rejected Respondents' *Force Majeure* Claim are further detailed below.

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[2] As discussed below, the plans called for much of the work on the Eastern Cell to be performed from the land, working outward from a central berm adjoining the Eastern Cell.

B. EPA's Actions Related To Access Interfered With Respondents' Access Efforts And Constituted A Breach Of EPA's Obligation Of Good Faith And Fair Dealing Under The AOC.

Respondents have previously documented, and address again below, the extent to which EPA interjected itself in access negotiations with both TxDOT and Big Star and precipitated the impasse over access. Rather than acting to facilitate Respondents' efforts to obtain land access to the waste impoundments over the TxDOT ROW, EPA impeded those efforts. EPA delayed until shortly before the deadline set for construction to commence in even approving the use of the ROW for access and then invited TxDOT to unilaterally set the terms under which it would permit access. When TxDOT continued to demand indemnities unrelated to use of the TxDOT ROW for access (*e.g.*, indemnities for its own past and future gross negligence and willful conduct), EPA "conveyed agreement" to TxDOT with such terms.

In the case of Big Star, EPA took a similar tack. EPA ignored the evidence provided to it by Respondents that Big Star had been involved in dredging activity that undermined the berms on the Western Cell and caused releases into the San Jacinto River of the material in the waste pits, with EPA's counsel insisting that EPA lacked sufficient information to name Big Star as a PRP at the Site. EPA also invited Big Star to unilaterally set the terms under which it would allow the use of its property for a few months for TCRA construction. Those terms included, in addition to rent and other monetary payments, a full release of liability (including a release for its liability as a PRP at the Site), a commitment on the part of Respondents to remediate contamination on the Big Star property caused by the dredging activity and broad indemnities. EPA, however, declined to press Big Star (as a potential PRP at the Site) to provide access on reasonable terms for the short term use of its property.

In the case of both TxDOT and Big Star, EPA seemingly made a premature determination that it would not use its order authority to obtain access for Respondents. At the same time, EPA sought to justify its interference with the access negotiations and its unwillingness to obtain access for Respondents by interjecting into the TCRA process the

notion that access to the waste impoundments via the TxDOT ROW was unnecessary and that the TCRA (construction of an "armor cap" over the 15 acre area of the waste impoundments, a task involving placement of millions of pounds of rock and other materials) could be performed entirely from the San Jacinto River.

These circumstances, as further detailed below, give rise to Respondents' Breach of Contract Claim. Respondents voluntarily entered into the AOC and committed to perform the TCRA. They did so with the expectation that EPA would work in good faith to ensure that access necessary to perform the TCRA was obtained if Respondents, despite their best efforts, were not able to obtain the necessary access. EPA's failure to meet its contractual obligations to Respondents must be taken into account both in evaluating whether Respondents are entitled to relief under the *force majeure* provisions of the AOC and in addressing EPA's contentions, discussed below, that Respondents are subject to potentially millions of dollars in stipulated penalties for purportedly failing to meet interim construction deadlines related to the TCRA.

C. EPA Has No Basis For Seeking To Impose Stipulated Penalties on Respondents Related to Alleged Delays Associated With TCRA Construction.

Respondents also object to EPA's assertion that they are subject to stipulated penalties under the AOC as a result of the delay in obtaining access. EPA has made such assertions in the February 16 Letter, in a series of notices of violation ('NOVs")[3] and most recently in the August 5 Letter. The potential stipulated penalties identified in the August 5 Letter, which Respondents understand to incorporate prior NOVs, are in the millions of dollars. Respondents have invoked dispute resolution under the AOC regarding the NOVs and the

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[3] The NOVs were dated January 14, 2011, January 21, 2011, January 24, 2011 and March 3, 2011. The Dispute Notices are contained in letters dated February 14, 2011, February 22, 2011 and April 4, 2011. Respondents have also invoked dispute resolution regarding other determinations by EPA, such as those in the February 16 Letter and two letter dated March 3, 2011 (in addition to the NOV of the same date). All of the Dispute Notices relate to or arise from the same issue – EPA's attempt to convert the construction schedule for the TCRA, which assumed timely access to both the TxDOT ROW and the Big Star Property, into a basis for the imposition of stipulated penalties.

February 16 Letter in a series of letters to EPA, and they are concurrently with making this Submission, invoking dispute resolution regarding the August 5 Letter (collectively, "Dispute Notices").[4]

As addressed in the Dispute Notices, EPA has attempted to convert interim deadlines in a construction schedule prepared by the TCRA construction contractor into the source of deadlines that it claims support the imposition of stipulated penalties. EPA has taken this position – and apparently, based on the August 5 Letter, intends to maintain it – even though (1) Respondents worked on an accelerated basis once access was obtained in order to complete the TCRA construction and completed it ahead of the original completion date in that schedule, (2) met deadlines under the "Project Schedule" (negotiated and approved by EPA) and contained in Section IV of the Statement of Work (Appendix D to the AOC), and (3) Respondents have met each and every "compliance milestone" identified in Paragraph 76.b of the AOC as a basis for imposition of stipulated penalties. Those "compliance milestones" in Paragraph 76.b are:

(1) Conceptual Design of all Removal Actions Technical Memorandum
(2) Draft Removal Action Work Plan
(3) Draft Health & Safety Plan
(4) Final Removal Action Work Plan
(5) Final Health & Safety Plan
(6) TCRA Implementation (start of on-site construction activities), and
(7) Removal Action Completion Report.

As noted above, the Respondents have met all of the compliance milestones specified in the AOC. They also have complied with the Project Schedule in the Statement of Work.

EPA's attempt to impose stipulated penalties is based on a construction schedule prepared as a "Gantt chart" that was prepared by Respondents' construction contractor, USA Environment, LLP ("USA Environment"), to foster communication between the Respondents'

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[4] The Dispute Notices related to the NOVs and the February 16 Letter are identified in the appendix, discussed in Section III below, that accompanies this Submission. EPA has taken the position that the dispute resolution process under the AOC need not proceed until it assesses stipulated penalties. Thus, no determination has been made on the issues raised in previously submitted Dispute Notices.

engineers and USA Environment ("Construction Schedule"). EPA has done so on the basis that its "approval" of the Gantt chart – which occurred at a time EPA already knew there was an impasse regarding access that it itself had precipitated – allows EPA to treat each and every deadline in that schedule into a deadline enforceable under the AOC and a basis for stipulated penalties under the terms of that contract. In order to develop an overall schedule for the construction, the chart included beginning and end dates for specific tasks. The chart was intended to be a tool to guide the construction process, and it was anticipated that it would need to be modified to address conditions in the field during construction. It was also prepared on the assumption that access arrangements would be in place as of the date planned for the start of TCRA construction.

EPA then sought to establish this Construction Schedule as the "approved" schedule for the TCRA in a letter to the Respondents' Project Coordinator, David Keith, Ph.D., of Anchor QEA, dated December 15, 2010. This was after the December 8, 2010 date on which TCRA construction was to begin, a date that was based on EPA's prior approval of the RAWP. It also occurred at a point at which the impasse over access had occurred, as a result of EPA's request to both TxDOT and Big Star to unilaterally set the terms on which they would permit access. The approval also came several weeks after EPA's counsel – as addressed below – publically announced at a December 1, 2010 meeting that Respondents' "best efforts" to obtain access were no longer relevant and that Respondents could either accept the unilaterally-set terms demanded by TxDOT or access the Site entirely via the water.

Moreover, Dr. Keith had had a series of conversations with EPA's TCRA Project Coordinator in which Dr. Keith repeatedly informed the EPA's Project Coordinator that a literal interpretation of the sequence of events shown in the schedule was not appropriate. In addition, the RAWP (which EPA had previously approved) specifically noted that the sequencing of tasks shown in the Gantt chart and the overall schedule would require adjustment. Section 4.1 of the RAWP (Construction Schedule), states:

The following major construction elements are required to complete the TCRA work. Each item, shown in Table 4-1, is in approximate sequential order. Figure 4-1 presents a detailed construction schedule for the project, including conceptual interrelationships between each of these project elements. This schedule is subject to change because of weather and other unforeseen circumstances, and will be reviewed and refined by the TCRA contractor and continuously updated throughout the duration of the TCRA work.

Table 4-1
Construction Elements and Duration

Element	Duration
Mobilization	1 week
Site Preparation and Access Road Construction	
Laydown area preparation	1 week
Access road construction	1 week
Clearing and grubbing site	2 weeks
Site Stabilization	
Geotextile and geomembrane placement	6 weeks
Cap A placement	6 weeks
Cap B placement	10 weeks
Cap C placement	6 weeks
Cap D placement	4 weeks
Cap E placement	1 week
Site Cleanup	2 weeks
Demobilization	1 week
Total Duration[1]	**36 weeks**

1 – Note: "Total Duration" is not equal to the sum of all activities because some overlap of tasks has been assumed. Actual duration will be determined by the contractor during their project planning.

Notwithstanding the above, EPA took the Construction Schedule, intended as a tool for the construction process, and purported to "approve" it. EPA now purports to rely on that same Construction Schedule in an attempt to impose millions of dollars in stipulated penalties

on Respondents, based on their purported failures to make submissions or complete activities by the dates set forth in the Construction Schedule. As explained in the Dispute Notices (which Respondents incorporate by reference in support of this Submission), dates for specific tasks in the Construction Schedule were identified in order to establish an overall schedule and a final completion date for TCRA construction – assuming land access. The Construction Schedule was never intended to establish specific dates for completing specific tasks, given the complexity of the construction project, the challenges of working in a marine environment, and the anticipated need for adjustments in the field to the order of work, the tasks required, and the time required to complete specific tasks. It was never intended as a schedule that would apply if the TCRA had to be performed entirely from the water.

EPA's press for stipulated penalties, even after Respondents completed the TCRA construction early, complied with the Project Schedule and have met each and every one of the "Compliance Milestones" set out in Paragraph 76.a of the AOC, bears close scrutiny. That is particularly the case, given that EPA to date has failed to acknowledge the impact of its interference in access efforts and its breach of its obligations of good faith and fair dealing under the AOC that give rise to Respondents' Breach of Contract Claim.

D. EPA Should Reconsider and Withdraw Its Denial of Respondents' *Force Majeure* Claim, Acknowledge That A *Force Majeure* Event Occurred, and Withdraw Its Claims for Stipulated Penalties Based on Respondents' Alleged Non-Compliance With the AOC.

Respondents request that EPA, after reviewing Submission and the supporting documentation that accompanies it, reconsider its prior denial of Respondents' *Force Majeure* Claim. Respondents also request that EPA recognize and acknowledge – to the extent that EPA is not willing to withdraw its claims of non-compliance with the AOC – that a *force majeure* event occurred that excuses any non-compliance with the AOC.

In addition, EPA should reconsider its position that Respondents are subject to stipulated penalties under the AOC because of their purported failure to meet deadlines in the

Construction Schedule. Respondents have met all of the "compliance milestones" under the AOC. EPA's attempt to approve a construction schedule that was clearly subject to change based on developments during construction and was premised on land access being available is not a proper basis for seeking to impose stipulated penalties on Respondents. In addition to purporting to create "deadlines" under the AOC by approving the Construction Schedule, EPA not only failed to facilitate Respondents' efforts to obtain access but in fact, interfered in those efforts. EPA also interjected the supposed "alternative" of "water only" access.

When the parties entered into the AOC, EPA assumed a contractual obligation to deal fairly and in good faith with Respondents with respect to obtaining access needed for TCRA construction. EPA not only failed to satisfy its contractual obligations to Respondents but seemingly elected to pursue a course of action intended to interfere in the timely and efficient completion of the TCRA. Under such circumstances, EPA has no basis for continuing to pursue stipulated penalties and should withdraw its August 5 Letter and decline to pursue any alleged stipulated penalties under the AOC.

III. SUPPORTING DOCUMENTATION AND EVIDENCE.

This Submission includes an appendix containing documents related to Respondents' access efforts and their *Force Majeure* Claim and Breach of Contract Claim ("Appendix"). The Appendix includes the following:

- a map of the waste impoundments and surrounding properties (including the TxDOT ROW and the Big Star property) (Item 1);
- prior correspondence submitted by Respondents to EPA regarding their efforts to obtain access, their *Force Majeure* Claim and Breach of Contract Claim together with correspondence with EPA regarding EPA's insertion in the RAWP, over Respondents' objections, of provisions requiring that the TCRA be performed utilizing "water only" access, together with notes from a November 16, 2010 technical meeting at which the "water only" option was discussed (Items 2 to 18 and 22);
- the NOVs and Dispute Notices (Items 19 to 21 and 23 to 26);

- chronologies detailing Respondents' joint efforts to obtain access, one with respect to efforts to obtain access to the TxDOT ROW ("TxDOT Chronology") and the second with respect to efforts to obtain access for a Laydown Area and marine access on the Big Star property ("Big Star Chronology") (Items 27 and 28);

- a statement regarding Respondents' efforts to locate alternative locations to the Big Star property ("Alternative Site Search Statement") (Item 29);

- the Technical Response, which was prepared by Respondents' TCRA contractor, Anchor QEA, responding to the EPA January 21 Memorandum referenced above with respect to the environmental, health and safety risks and other aspects of a "water only" access scenario (Item 30);

- weekly reports submitted by Respondents to EPA under the TCRA describing activities undertaken prior to and during the *force majeure* period (Items R-1 to R-13); and

- in response to the enclosure to the February 16 Letter in which EPA addresses Respondents' access efforts during December 2010 ("Log Comments"), a document that responds to each of EPA's comments on those access efforts ("Respondents' Position Regarding December Access Efforts") (Item 31).

Respondents reserve the right to submit additional evidence in support of their position, particularly in the event that EPA seeks to assess stipulated penalties. In particular, Respondents are prepared to submit sworn statements in support of their objection to specific factual assertions made by EPA in the February 16 Letter.

IV. EPA'S STATEMENT TO THE CONTRARY, RESPONDENTS ARE NOT CLAIMING THAT INABILITY TO OBTAIN ACCESS EXCUSED THEM FROM PERFORMING THE TCRA, AND THEIR *FORCE MAJEURE* CLAIM APPLIES TO THEIR INABILITY TO OBTAIN ACCESS FROM BIG STAR AS WELL AS TXDOT.

Contrary to EPA's assertions, Respondents did not (and do not) contend that the *force majeure* event excused them "from conducting all subsequent TCRA Work activities." February 16 Letter at 3. Nor do they contend, as claimed by EPA, that "Respondents are asking EPA to excuse their nonperformance of all TCRA Work activities starting January 5, 2011, and continuing through the completion of the TCRA, September 2, 2011." *Id.* at 5. The *force majeure* notice, and Respondents' subsequent submissions in support of that notice, specifically stated that the *Force Majeure* Claim was based on *delay* in obtaining access; they

also stated that Respondents had made necessary preparations and stood "ready, willing and able" to proceed to implement the TCRA once access could be obtained. Appendix, Items 15-17 and 22.[5]

Respondents' actions have also been consistent with the above characterization of their *Force Majeure* Claim. After submitting their *force majeure* notice, Respondents continued to perform the TCRA. The work Respondents were performing as of January 4, 2011 (the date they allegedly "ceased work") and performed in the weeks that preceded and followed that date is described below, in Section V. Respondents would not have continued to perform the TCRA work had they regarded themselves to have been relieved of any obligation to perform the TCRA by the *force majeure* event. Respondents also continued to seek access. Once access was obtained, they immediately moved forward in performing the TCRA, even to the extent of taking steps (such as moving to a six day work week) to speed the pace of construction in an attempt, notwithstanding the delays resulting from the *force majeure* events and from EPA's actions, to complete the TCRA by the September 2, 2011 "project completion date" unilaterally set by EPA when it purported to approve the Construction Schedule.[6] They in fact were able to accomplish this goal.

EPA has also characterized the *Force Majeure* Claim as applying only to access to the TxDOT ROW. February 16 Letter at 1 and 3. The claim, however, also extends to delay associated with Respondents' ability to timely obtain access to the Big Star property. Appendix, Items 16, 17 and 22.

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[5] By way of example, see Appendix, Item 15 (December 30, 2010 Force Majeure Notice) ("Please consider this the Respondents' notice that their inability to reach an agreement with TxDOT constitutes a *force majeure* event . . . that may delay the performance of the work"), Item 4 (MIMC January 4, 2011 Letter) (same statements as above; description of "details supporting the claim" refers to the "anticipated duration of the delay") and Item 22 (January 28, 2011 Letter) (referencing delay).

[6] This September 2, 2011 "compliance date" is a date that EPA adopted from a Gantt Chart prepared by Respondents' contractor, USA Environment. The specific line item in the Gantt Chart is titled "Final Report" which is a final report that USA was to provide to the Respondents' engineering contractor, Anchor, QEA, and was not meant to signify the due date of the final report from the Respondents. Section IV of the Statement of Work in the AOC states that the final report is due 60 days after the completion of the TCRA implementation.

V. RESPONDENTS DID NOT CEASE PERFORMING WORK ON JANUARY 4, 2011 (AS CLAIMED BY EPA) OR AT ANY OTHER TIME.

The February 16 Letter incorrectly states that "[on] or about January 4, 2011, Respondents ceased to perform all work all [TCRA] work activities for the site." February 16 Letter at 1.[7] In fact, at no point did Respondents cease to perform TCRA work under the AOC.

Respondents commenced work on December 8, 2010, the date set for commencement of construction pursuant to the terms of EPA's approval of the RAWP. Appendix, Item 23 (February 14, 2011 Dispute Notice, Exhibit B). As of January 4, 2011, Respondents had performed and were continuing to perform all of the activities required under the TCRA, to the extent that they could do so without having access agreements with TxDOT and Big Star.[8] Respondents also were involved in taking other actions to ensure that construction could proceed as quickly as possible after access arrangements had been finalized.

During the first week of January 2011 (the week during which Respondents allegedly "ceased performing" the TCRA), the work performed by Respondents included:

- on January 4, 2011, submitting to EPA, the Army Corps of Engineers and the Texas Commission on Environmental Quality, a draft report under Section 404(b)(1) of the Clean Water Act (which included a delineation of potentially jurisdictional waters), a statement regarding consistency with coastal management plans, and a threatened and endangered species survey for the Site;
- on January 4, 2011, submitting to EPA's TCRA Project Coordinator an evaluation regarding potential change in water surface elevation due to the placement of the capping required as part of the TCRA;

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[7] The same claim, in a letter from EPA dated March 3, 2011, is disputed in Respondents' April 4, 2011 Dispute Notice. Appendix, Item 26.

[8] The activities included: (1) clearing and grubbing of the central berm and a portion of the Western Cell in coordination with RI/FS sampling activities; (2) ordering armor cap natural stone and processed concrete aggregate; (3) ordering and testing samples of armor cap natural stone; (4) ordering geotextiles and geomembranes required for the construction project; (5) ordering construction trailers and supplies for the construction administration area; (6) coordinating with contractors and subcontractors on equipment and material delivery and revising plans and schedules because of Site access issues; (7) making arrangements for off-site material storage (assuming that the Big Star property would not be available for these activities); (8) providing EPA with cultural resource documentation; and (9) participating in community outreach meetings and Community Awareness Committee meetings. Appendix, Item 26 (April 4, 2010 Dispute Notice).

- completing the installation of "Phase Two" fencing in the TxDOT ROW and around the Big Star property (which was begun following the December 8, 2010 construction commencement date);
- installing additional warning signs on the fencing and Site perimeter;
- meeting with EPA's TCRA Project Coordinator on January 7, 2011 to select locations for large EPA signs;
- having the construction contractor, USA Environment LLP ("USA Environment"), continue preparing the work plans required by the RAWP, in order to be ready to complete and submit such work plans once the details of access (required to complete the work plans) had been determined;
- visiting the quarry in Marble Falls, Texas that was producing aggregate to be used in constructing the armor cap and collecting aggregate samples to be submitted for laboratory chemistry, as required by the RAWP; and
- installing and surveying tide gauges in locations in the San Jacinto River.

Appendix, Item R9 (TCRA Weekly Report No. 09). These activities were in addition to continued efforts related to access that took place that week and are described below. In the following weeks, until access was obtained, Respondents continued with a variety of tasks related to the TCRA, as documented in the TCRA weekly reports for the subsequent weeks. See Appendix, Items R10 - R12 (TCRA Weekly Report Nos. 10 – 12).

During the first week of January (when, according to EPA, Respondents had "ceased work"), Respondents had discussions with TxDOT's counsel, provided proposed revisions to certain provisions of the TxDOT access agreement, and addressed insurance issues raised by TxDOT's counsel related to the "fence" access agreement. Appendix, Item 27 (TxDOT Chronology at 36). Respondents also had further communications with Big Star's counsel and EPA, in the hope that Big Star would reconsider the releases, remediation obligations and indemnities on which Big Star had conditioned any lease of the Big Star property for the TCRA construction project. Appendix, Item 28 (Big Star Chronology at 25). They also continued to explore alternative locations for the activities planned for the Big Star property. Appendix, Item 28 (Big Star Chronology at 25-26) and Item 29 (Alternative Site Search Statement at 2).

During the next several weeks, and until access issues were resolved in late January, 2011, Respondents continued to work on tasks related to the TCRA and continued with their efforts to obtain access. Appendix, Items R10 – R12 (TCRA Weekly Report Nos. 10-12); Item 27 (TxDOT Chronology at 36-38), Item 28 (Big Star Chronology at 25-28), and Item 29 (Alternative Site Search Statement at 2-3). These activities, together with the TCRA work activities Respondents performed during the first week of January, are inconsistent with EPA's claim that Respondents "ceased work" on the TCRA on January 4, 2011, and demonstrate that EPA has no factual basis for its claim that Respondents "ceased work" as of January 4, 2011.

VI. RESPONDENTS DILIGENTLY SOUGHT ACCESS FROM TXDOT.

The February 16 Letter asserts that Respondents were not diligent and did not "display timeliness" in seeking access from TxDOT. February 16 Letter at 6. EPA attributes the failure of Respondents' efforts to obtain access for a road across the ROW to the "incremental" approach that Respondents purportedly adopted in seeking access. *Id.* at 5. According to EPA, the "incremental approach" consisted of first seeking access to perform sampling and not seeking access for a road until after the sampling results were in hand. *Id.* at 4-5 EPA also claims that Respondents caused delays at various points in the process. *Id.*

As demonstrated below, the "incremental approach" Respondents supposedly pursued was one that EPA required them to adopt. Furthermore, instances of delay in pursing access that EPA attributes to Respondents are not supported by the record. The discussion below demonstrates that Respondents' efforts in seeking access from TxDOT more than satisfied the level of "best efforts" necessary for EPA to recognize Respondents' *Force Majeure* Claim and to meet Respondents' obligations under the AOC.

A. EPA Has No Basis For Dismissing Respondents' Access Efforts During December 2010 Or Characterizing Them As Demonstrating any Overall Lack Of Urgency In Obtaining Access.

Without any justification, EPA has sought to discount or dismiss the steps Respondents took during December 2010 to obtain access from TxDOT. EPA has characterized Respondents' efforts during December as reflecting a "lack of urgency." *Id.* at 6. In the February 16 Letter, EPA then purports to generalize this "lack of urgency" to an overall lack of diligence on Respondents' part in seeking access from TxDOT. *Id.*

Respondents have specifically responded to EPA's "analysis" and attempt to discount their December access efforts in Respondents' Position Regarding December Access Efforts (Appendix, Item 31), which they incorporate by reference as part of this discussion. EPA has taken the approach, in its Log Comments, of picking through specific activities or discussion that are identified in Respondents' log of daily access-related activities for December 2010. That log was submitted to EPA with Respondents' letter to EPA addressing their access efforts dated January 5, 2011 ("January 5, 2011 Letter"). Appendix, Item 18. EPA discounts Respondents' December access efforts for the following reasons:

- EPA concluded that only 15 of 43 "efforts" during December were in fact directed to seeking access from TxDOT. This numeric approach is inappropriate. Not all "efforts" are equivalent and counting individual events is not an appropriate means of assessing Respondents' level of overall effort.

- EPA's approach also trivializes the obstacles Respondents faced in pursuing access discussions during December, once both TxDOT and Big Star – at EPA's direction – had submitted their unilateral demands as to the conditions under which they would permit access and then largely or entirely refused to consider any changes to those terms – which were objectionable and unreasonable for reasons set forth below. Those obstacles included:

    - TxDOT's refusal to have any substantive discussions with Respondents regarding access until December 17, 2010;

    - the unavailability of anyone at TxDOT to discuss access from December 21, 2010 until after the New Years' holiday resulting in a total of TWO days in December during which TxDOT would discuss even access with Respondents;

- TxDOT's refusal in discussions on those two days, to consider withdrawing the unreasonable indemnities unrelated to the use of the ROW for the TCRA that it continued to demand; and

- the refusal of Big Star's counsel to meaningfully discuss access for a Laydown Area and dock facility after Big Star, in response to EPA's direction, submitted on December 3, 2010 a lease containing the terms it was demanding as a condition to allowing Respondents to use its property.

- In addition, the "count" performed by EPA's counsel ignores the overall context and scope of Respondents' efforts to obtain access. It also does not include in the "count," and rejects as part of those efforts, for example, communications with EPA about access and the effort to obtain the van der Horst access agreement as "unnecessary," even though pinning down the terms TxDOT required to grant access to EPA might have provided a further basis on which to press TxDOT to withdraw its unreasonable demands.

Appendix, Item 31 (Respondents' Position Regarding December Access Efforts at 1-2).

B. Respondents Engaged In Enormous Efforts Over A 13 Month Period To Obtain Land Access For The TCRA.

The only land access to the waste impoundments is through the TxDOT ROW. Respondents' efforts to obtain access from TxDOT to construct a road to the waste impoundments across the TxDOT ROW extended over a 13-month period, beginning in January 2010, months before the AOC became effective. The efforts included numerous calls with counsel for EPA and TxDOT, the exchange of hundreds of email messages, and the drafting and exchange of multiple drafts of access agreements and exhibits.

The description below details the course of the negotiations, in order to provide context and a basis for assessing the misstatements made by EPA in the February 16 Letter about Respondents' purported delay and lack of diligence. Those misstatements are identified and discussed in the attached List. None of those misstatements are supported by the record. Each response to a specific EPA claim about Respondents' access efforts is in italics and in bold.

I. <u>January to April 2010</u>

Respondents initiated discussions with TxDOT regarding access in January 2010. Appendix, Item 27 (TxDOT Chronology at 1-2). At this time, Respondents were in the initial

stages of performing a remedial investigation ("RI") of the Site, pursuant to the terms of the unilateral administrative order EPA had issued to them in November 2009 ("UAO") and were engaged in discussions with EPA regarding site stabilization activities at the Site. These efforts continued during February and March, and included (1) obtaining a draft access agreement from TxDOT, (2) providing comments on the TxDOT draft, and (3) developing and providing to TxDOT for review details regarding the layout and construction details for a road on the ROW. *Id.*

Early in those discussions, TxDOT sought to condition any access on Respondents' agreement to take on broad obligations unrelated to the use of the ROW for a road (including indemnities extending to TxDOT's own actions.) Appendix, Item 27 (TxDOT Chronology at 1-3). Respondents objected to such terms as being overreaching and inappropriate in connection with the limited use of the ROW for a road. *Id.* at 3.

In early 2010, EPA asked Respondents to install fencing on the TxDOT ROW to prevent public access to the Site. Respondents attempted to include provisions regarding the fencing in the same access agreement they had been negotiating with TxDOT relative to the road. *Id.* Ultimately, however, TxDOT – in response to a request by EPA – separated the fencing and road issues. *Id.* at 3-4. This meant Respondents were required to proceed on an incremental basis to obtaining access for these two uses from TxDOT.

For the limited purpose of constructing fencing, TxDOT agreed to grant access without insisting that the objectionable terms associated with the road license agreement be included, while indicating it was not agreeing to allow a road on the ROW that did not contain such terms. *Id.* In early April 2010, a "fence only" access agreement was reached with TxDOT (and the installation of the fencing occurred shortly thereafter). *Id.* at 4.

Once the "fence only" agreement was reached, Respondents promptly renewed discussions with TxDOT regarding access to the ROW for a road. On April 15, 2010, as Respondents were preparing to send a proposed "road" access agreement to TxDOT, they

were informed by TxDOT's counsel that TxDOT would require Respondents to sample the ROW for the presence of contaminants before it would make a decision to allow a road on the ROW. *Id.* Respondents sent the already drafted agreement to TxDOT's counsel; they also requested that their technical consultants begin preparing a sampling plan and engaged in discussions with TxDOT and EPA about the scope of the sampling. *Id.* at 5.

2. May and June 2010

Discussions with TxDOT regarding the sampling plan and the proposed access agreement continued during the first part of May, with Respondents continuing to seek a "single agreement" covering access for the sampling and for a road. *Id.* at 5-7. Respondents also had a series of communications with TxDOT and EPA in early May regarding the scope of the sampling. *Id.* at 6-7. EPA's counsel, in a May 11, 2010 email, stated that EPA wanted to defer that discussion (of a "single agreement") until it had reviewed the proposed sampling plan. *Id.* at 6. On May 14, 2010, Respondents provided a proposed sampling plan to counsel for both EPA and TxDOT. *Id.* at 7.

EPA asserts that Respondents "spent a month discussing how to sample" instead of "putting a sampling plan into writing, despite EPA's request that sampling discussions start with a written draft sampling plan. February 16 Letter at 4. EPA's statement ignores the series of communications during this period to address bona fide issues that needed to be addressed in defining the scope of the sampling and the fact that Respondents, after receiving the May 11, 2010 email from EPA's counsel, promptly circulated a draft sampling plan.

On May 18, 2010, Respondents received comments from TxDOT on the sampling plan. On May 24, 2010, they circulated a revised version of the sampling plan. They received further comments from TxDOT on May 25, 2010 and circulated a further revised version of the sampling plan on May 28, 2010. *Id.* at 7.

On May 25, 2010 while the sampling plan was undergoing final revisions, EPA's counsel informed Respondents' counsel that EPA wanted there to be a single agreement with TxDOT covering sampling and the road construction and stated that she would inform TxDOT of that position. The following day, consistent with EPA's direction, Respondents provided TxDOT with an updated "sampling and road" access agreement. *Id.*

Respondents then continued their communications with TxDOT's counsel about a proposed agreement and TxDOT's review of the sampling plan (which had already been revised twice to address TxDOT's comments). *Id.* at 7-8. They also regularly reported to EPA's counsel on the status of those efforts. *Id.*

On June 11, 2010, TxDOT's counsel notified Respondents that TxDOT would not enter into an agreement covering both sampling and access for a road; Respondents' counsel promptly raised TxDOT's position with EPA's counsel. *Id.* at 8. In a call with EPA's counsel on June 15, 2010, Respondents' counsel described the obstacles associated with reaching an agreement with TxDOT (including indemnities and obligations unrelated to the use of the road that TxDOT was demanding and TxDOT's rejection of a single agreement). During this call, EPA's counsel characterized Respondents' position as "reasonable."[9] *Id.* at 8-9. She also confirmed in an email a few days later (on June 21, 2010) that it remained EPA's position that there should be a "single agreement" with TxDOT covering both sampling and the road. *Id.* at 9.

On June 25, 2010, EPA abruptly changed course and required Respondents, over their objections, to pursue an "incremental" approach. On that date, EPA's counsel notified Respondents that they should sign the draft "sampling only" agreement that TxDOT had circulated on June 11, 2010. *Id.* at 9-10. Respondents' counsel promptly informed EPA's

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[9] ***The February 16 Letter states that EPA's counsel does not recall telling Respondents counsel during this time period that their position regarding indemnities demanded by TxDOT was reasonable. February 16 Letter at 7. In fact, counsel for International Paper specifically recalls that statement, based on an email prepared that same day which described the conversation.***

counsel that they had not reviewed or commented on the TxDOT "sampling only" access agreement because they had been moving forward, as directed by EPA, in seeking a combined agreement. *Id.* They also, as EPA knew, were unable to have further discussions with TxDOT's counsel, who was out of the office until the end of the month. *Id.*

In light of EPA's change in position, Respondents' counsel requested a conference call with EPA's counsel and sent her emails addressing why a single access agreement was needed. *Id.* In a June 28, 2010 email, EPA's counsel acknowledged the arguments made by Respondents but stated that they "now needed to proceed to enter into a sampling only access agreement with TxDOT." *Id.* at 10. The email also stated that EPA:

- now wanted to review results from sampling on the ROW before "determining if a laydown area and road are feasible on the [TxDOT ROW];"
- it "not decided on the proper course of action for site stabilization [which will] determine the type of access that will be needed;" and
- has "not been determined that the TxDOT access is integral to EPA's site stabilization."

The email went on to state that EPA's Project Manager was looking for site stabilization activities to begin in about 60 days but also EPA would not determine if TxDOT access is integral to "EPA's site stabilization" for a "few more weeks in the future." *Id.* The following day, June 29, 2010, Respondents submitted comments to TxDOT's counsel regarding the TxDOT "sampling only" agreement. *Id.*

The above discussion demonstrates that any "incremental" approach was undertaken at EPA's direction, over Respondents' objection. EPA's claim that Respondents adopted that approach is a blatant misrepresentation of the record. EPA also has no basis for suggesting that Respondents are responsible for delays associated with pressing for a combined agreement during June (February 16 Letter at 4-5 and 7); they were following EPA's direction at the time by seeking a combined agreement. EPA accuses Respondents of delaying two weeks in providing comments

on the "sampling only" access agreement circulated by TxDOT on June 11, 2010 (February 16 Letter at 5), but the circumstances described above demonstrate that Respondents provided their comments on that agreement one day after EPA's counsel confirmed that EPA was directing Respondents to follow an "incremental" approach. Moreover, when Respondents provided their comments on the sampling-only agreement, TxDOT's counsel had not yet returned from a vacation, a vacation that began more than a week before EPA changed its position on the need for a combined agreement.

3. July to September 2010

On July 1, 2010, Respondents submitted one of the series of letters they submitted to EPA under the AOC detailing their efforts to obtain access. Appendix, Item 6. The letter addressed the impact of – and uncertainty created by – EPA's change in position relative to a single agreement with TxDOT. It also addressed the uncertainty created by EPA counsel's statement that EPA would not make a determination as to whether Respondents would be permitted to construct a road on the TxDOT ROW until it had reviewed the sampling results.

Given EPA's change in direction, Respondents moved forward with a "sampling only" access agreement with TxDOT. On July 2, 2010, just before the Fourth of July weekend, Respondents received a revised draft from TxDOT (responding to Respondents' June 29, 2010 comments). Appendix, Item 27 (TxDOT Chronology at 11). On July 7, 2010, Respondents in turn commented on that draft. An agreement with TxDOT for access for sampling was reached by mid-July, and Respondents signed and submitted signature pages on the agreement to TxDOT on July 16. *Id.* ***Given the above steps taken by Respondents, the record does not support any claim by EPA that Respondents were dilatory in concluding an access agreement with TxDOT to conduct the sampling.***

In addition, during July, Respondents submitted to EPA the final sampling plan for the work on the TxDOT ROW. *Id.* The sampling plan, which had previously been approved by

both EPA and TxDOT, provided that validated results of the sampling would be submitted to EPA and TxDOT within a specified period following receipt of such results.

TxDOT could not sign the sampling only access agreement until it was approved by the Federal Highway Administration ("FHA"). *Id.* at 11-12. It was not until August 2, 2010 more than two weeks after Respondents signed the "sampling" access agreement, that Respondents' counsel were notified by TxDOT's counsel that the FHA had approved the agreement. Respondents did not receive the signed agreement until August 6, 2010. *Id.* at 13.

Once they had access for the sampling, Respondents immediately moved forward to make arrangements to conduct the sampling, including giving TxDOT the three days notice required for access to the ROW to conduct the sampling. *Id.* The sampling took place on August 11 and 12, 2010. Respondents directed their consultant to have the samples analyzed on an expedited basis. *Id.* Even with expedited analysis, the validated results of the sampling were not available until late September.

TxDOT's counsel had made it clear that TxDOT would not further discuss access for a road until it had reviewed the sampling results. Further, EPA's counsel had made it clear that EPA could not make a decision on whether a road could be constructed on the ROW until it had reviewed the sampling results. At this point, pending receipt of sampling results (a process requiring weeks for processing and validation, even on an expedited basis), the discussions with TxDOT were at a standstill.

By this time, EPA had selected a technical alternative for the TCRA and issues regarding certain aspects of the selected alternative relevant to its design and the work plan to implement it were being addressed. There thus was no immediate need for access to the ROW. During this time, however, Respondents were working with TxDOT to amend the April 1, 2011 "fence only" access agreement to allow for the installation of additional fencing to secure the Site. *Id.* at 14. Respondents also initiated discussions during this time with Big

Star regarding the specifics of use of Big Star's property for a Laydown Area. Appendix, Item 28 (Big Star Chronology at 3).

Respondents' consultants received the validated results of the TxDOT sampling on Friday, September 24, 2010 and began reviewing and assembling the results in order to provide them to EPA and TxDOT. Appendix, Item 27 (TxDOT Chronology at 14). This followed the submission to EPA in mid-September of an initial draft of the RAWP. *Id.* The draft RAWP had been prepared assuming that the work would be performed employing land access via the TxDOT ROW for some of the work and water access, supported by land-based activities, for other portions of the work. *Id.*

EPA claims in the February 16 Letter that Respondents had unvalidated results earlier (which is correct) and delayed by not providing them to TxDOT. Respondents, however, always understood TxDOT's position to be that it would require final validated results in order to evaluate whether it would allow a road on the ROW, and that is what the sampling plan approved by both EPA and TxDOT required. Appendix, Item 27 (Big Star Chronology at 11). Moreover, the issue of Respondents' earlier receipt of unvalidated data was only raised by EPA much later, long after Respondents had submitted the validated results to TxDOT and EPA.

On September 30, 2010, Respondents provided the validated results to both EPA and TxDOT. Appendix, Item 27 (TxDOT Chronology at 15). The results disclosed the presence of dioxins in soil below industrial (and in all but one instance, residential) levels for dioxins and furans based on EPA's current Preliminary Remedial Goals for such substances. *Id.* The levels, in terms of worker health and safety, were ones that could be addressed consistent with the Respondents' health and safety plan that EPA had previously approved for the TCRA for activities on the waste impoundments themselves (at which much higher levels of dioxins and furans were present in soil).

On September 29, 2010, the day before the sampling results were submitted, EPA's counsel notified Respondents' counsel that EPA would be defining a standard for dioxin limits that would determine whether and if so, where EPA would allow a road to be constructed on the ROW. *Id.* at 14-15. EPA's counsel also told Respondents' counsel that EPA was not prepared to use its order authority to obtain access from its "partner" TxDOT. *Id.* ***The February 16 Letter states that EPA's counsel made additional statements during this call about Respondents' need to demonstrate "best efforts." February 16 Letter at 8. That statement (which Respondents do not dispute) is beside the point. It was apparent from this call with EPA's counsel and subsequent communications, that EPA, at a minimum, was very reluctant to consider seeking access from its "partner" TxDOT, irrespective of how unreasonable the access terms demanded by TxDOT might be.***

4. October and November 2010

During early October 2010, Respondents pressed EPA and TxDOT to evaluate the sampling data from the TxDOT ROW and make a decision regarding the use of the ROW for a road. *Id.* at 16-17. Respondents offered to make their consultants available to TxDOT to discuss the sampling results. As a result of these efforts, a call with TxDOT eventually took place on October 13, 2010. *Id.* at 17.

EPA claims that Respondents "waited two weeks" before discussing the sampling results with TxDOT and EPA. February 16 Letter at 5. That claim, however, flies in the face of Respondents' repeated and persistent efforts to get both EPA and TxDOT to assess the sampling results during this time period; it was EPA and TxDOT that were not available earlier to discuss the results. Appendix, Item 27 (TxDOT Chronology at 16-17).

During the October 13, 2010 call, it became apparent that TxDOT was not in a position to evaluate the sampling results (it did not have a staff toxicologist) and that a call with EPA should be scheduled. *Id.* at 17. Respondents made arrangements for that call to take place

on the following day, October 14, 2010. *Id.* at 17-18. During the call, EPA representatives stated that they were still evaluating whether to permit a road on the ROW. *Id.* At this point, it was unclear what criteria would be applied in making that assessment. EPA, after initially taking the position it would establish an exposure standard specifically for the ROW, had now changed that position and indicated that it no longer intended to set such a standard. Later in October, EPA again indicated it would set such a standard. EPA then, on October 25, 2010, approved the use of the ROW for a road, but did so without identifying what "standard," if any, it had applied in doing so. *Id.* at 18-19. After EPA determined that it would permit a road to be constructed on the ROW, Respondents continued to press TxDOT to allow a road on the ROW and for EPA to provide assistance to TxDOT in assessing the test results. *Id.* at 18-20.

Discussions during this time also included providing TxDOT and EPA with details about plans for the location and construction of the road. *Id.* at 17-20. ***EPA claims that it was delayed in being able to approve a road on the ROW by Respondents' failure to provide details about the road and its construction until January 2011. February 16 Letter at 4. In fact, information about the location and construction of the road was provided to EPA and TxDOT over the course of the access discussions, beginning as early as March 2010 and on many different occasions thereafter. Appendix, Item 27 (TxDOT Chronology at 3 and 18).***[10]

On October 18, 2010, while Respondents were still awaiting a decision by EPA as to whether it would allow a road on the ROW, EPA provided comments on the draft RAWP. Appendix, Item 9. The comments required that Respondents submit a revised RAWP

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[10] As discussed below, both TxDOT and Respondents proposed access agreements submitted to EPA on November 30, 2010 (Appendix, Item 18 (January 5, 2011 Letter, Exhibit 1 to December Daily Log) and Item 14 (November 30, 2010 Letter, Exhibit 31 to November Daily Log), each of which contained the same agreed-upon exhibits showing the proposed location of the road and providing details regarding its construction and maintenance. These exhibits had been agreed upon as between Respondents and TxDOT as part of the discussions that took place during November. Other than the later addition of a turnaround and material storage area and the addition of operational requirements related to activities in that area (because access to Big Star property could not be obtained), these exhibits were largely identical to those contained in the final agreement that was reached with TxDOT.

incorporating EPA's changes by November 1, 2010. *Id.* EPA's comments stated that EPA would require that language be inserted in the RAWP stating that Respondents would "obtain access to the Site via land or water," although EPA offered no technical justification for that change. *Id.* Respondents immediately objected to the requested changes to the RAWP regarding water access. Appendix, Item 27 (TxDOT Chronology at 18). EPA's response was to inform Respondents that they would be subject to stipulated penalties if they did not include the changes that EPA demanded in their November 1, 2010 submission.

On November 1, 2010, Respondents submitted a revised version of the RAWP to EPA. Appendix, Item 10. The revised version of the RAWP was submitted with a letter stating that:

- provisions regarding water access had been included under threat of stipulated penalties;
- "inclusion of EPA's language, however, does not constitute an admission or an agreement by either Respondent that EPA's revisions are accurate, necessary, consistent with prior EPA statements, or technically advisable or feasible;"
- Respondents dispute that "performing the work via water access (in the event that access via a road across the [TxDOT ROW] cannot be obtained) is an appropriate, technically advisable or feasible alternative"; and
- Respondents were submitting a letter regarding their efforts to obtain access that addresses the basis for Respondents' objections to any requirement that the work be performed via water access.

Id. Respondents' letter addressing the status of access efforts also included a memorandum prepared by Anchor QEA addressing why water only access was not a technically appropriate or feasible alternative (the "Anchor November 1 Memorandum"). Appendix, Item 11 (November 1, 2010 Best Efforts Letter, First Enclosure).

On November 8, 2010, two important events occurred. First, EPA approved the revised version of the RAWP containing the "water only" access language to which Respondents had objected. This triggered a 30 day deadline (December 8, 2010) for commencement of construction of the TCRA. Second, TxDOT notified Respondents that it was now prepared to permit a road to be built on the ROW, subject to more than ten

conditions (many if not most of which were unrelated to the use of the ROW for a road.) Appendix, Item 27 (TxDOT Chronology at 22). The conditions identified by TxDOT on that day included:

(1) an agreement to remove and dispose of offsite the top twelve inches of soil on the entire ROW including areas outside the portion of the ROW on which the road was to be located and including an area of the ROW located across the San Jacinto River – even though the sampling results had identified low levels of dioxins below existing EPA residential soil standards to be present at all but one sampling location on the ROW;

(2) an agreement to dispose of general trash and debris that had accumulated on the ROW over many years; and

(3) broad indemnities for past and future personal injury and cleanup liabilities associated with contaminants on the ROW irrespective of whether they came from the Site, including claims based on TxDOT's past and future negligence, gross negligence and willful conduct.

Id.

During the following weeks, Respondents worked diligently to address the conditions demanded by TxDOT and narrow areas of disagreement. *Id.* at 22-26. They also worked on defining the location of the road and agreed upon details regarding its construction and maintenance. *Id.* at 25. It quickly became apparent, however, that despite narrowing the differences, the scope of the remediation obligations demanded by TxDOT and the indemnities remained a stumbling block.

Respondents continued to keep EPA advised of the status of their access efforts, from both the legal and technical perspective. *Id.* at 23. By November 16, 2010, when Respondents' technical team met with EPA's TCRA Project Coordinator, to discuss plans for the TCRA, it was apparent that significant issues existed in obtaining access from TxDOT and EPA's counsel was continuing to insist on the viability of the "water only" access option EPA had inserted in the RAWP over Respondents' objections. *Id.* at 23-24. ***EPA now denies that the TCRA Project Coordinator acknowledged during a meeting on November 16, 2010 that "water only" access was not a technically viable option. February 16 Letter at 8.***

That, however, is at odds with contemporaneous notes of that meeting prepared by Respondents' consultants, as well as the recollection of those who attended the meeting. Appendix, Item 13 (Meeting Notes).

In any event, a meeting with Sam Coleman, the Superfund Division Director, took place two days later, on November 18, 2010. During the November 18, 2010 meeting, Respondents provided a presentation that expanded on the Anchor November 1 Memorandum's discussion of the risks and schedule impacts of a "water only" access scenario. Appendix, Item 27 (TxDOT Chronology at 24-25). Respondents also raised their objections to indemnity and certain other terms demanded by TxDOT but also noted that they had submitted an agreement to TxDOT that included many of the terms TxDOT was demanding. *Id.*

During this meeting, Mr. Coleman noted that EPA had itself been involved in lengthy negotiations with TxDOT over access at another Superfund site, the van der Horst site. *Id.* at 24. Respondents immediately sought a copy of the EPA-TxDOT access agreement for the van der Horst site, in order to determine what terms EPA had agreed to in order to gain access. *Id.* at 24 and TxDOT Chronology Exhibit 32. ***EPA over a period of months indicated it was seeking to locate that agreement, but then for the first time in the February 16 Letter, claimed no such agreement existed and Mr. Coleman had "misspoken." February 16 Letter at 7 – 8. EPA has also sought to characterize any such agreement as irrelevant, to Respondents' access efforts. Id. In fact, the terms that EPA itself agreed to in obtaining access from TxDOT are relevant, if not key, in assessing whether Respondents were obligated to accept such terms. EPA's own guidance indicates that indemnities of the kind sought by TxDOT are improper and***

should not be included in the agency's own access agreements. [11] ***Thus, the terms of any TxDOT-EPA access agreement remain very relevant.***

Following this meeting, EPA – without informing Respondents – asked TxDOT to submit to it by November 30, 2010 a signed access agreement containing its terms for access for a road on the ROW ("TxDOT Unilateral Version"), and TxDOT did so. *Id.* at 25-26. The TxDOT Unilateral Version contained the indemnity terms – unrelated to use of a road on the ROW - extending to TxDOT's own negligence, gross negligence and willful conduct and other terms to which Respondents had long objected. *Id.*

Respondents were unaware of EPA's request to TxDOT until November 29, 2010, when they learned of it from TxDOT's counsel. *Id.* at 25.[12] Respondents' counsel each recalls being surprised to learn of EPA's request, since EPA had not informed Respondents of this request. *Id.* ***In the February 16 Letter, EPA claims that the request for the submission of the TxDOT Unilateral Version was made during the November 18 meeting (and presumably in the presence of the various representatives of Respondents who participated in the meeting). February 16 Letter at 8. None of those present on behalf of Respondents recall such a request being made during the November 18 meeting. Appendix, Item 27 (TxDOT Chronology at 24). Had such a request been made during the meeting, it would have evoked an immediate response on the part of Respondents (as occurred after Respondents' counsel learned of the request on November 29, 2010 of EPA's request to TxDOT).***

Unaware of EPA's request to TxDOT to unilaterally set the terms for access, Respondents had worked with TxDOT subsequent to the November 18, 2010 meeting to

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[11] This issue is addressed in Respondents' January 5, 2011 letter (Appendix, Item 18 at 9).

[12] ***The February 16 Letter states that "[o]n November 30, 2010, EPA counsel did not ask TxDOT to submit in writing a signed access agreement." February 16 Letter at 8. Respondents never claimed such a request was made on November 30, 2010. Respondents learned of the request on November 29, 2010, so EPA must have made its request to TxDOT on or before that day.***

further narrow areas of disagreement and to agree upon the location and standards governing construction and maintenance of the road. *Id.* at 24-26. These efforts continued after Respondents learned on November 29, 2010, of EPA's request to TxDOT and through November 30, 2010. *Id.* at 25-26.

On November 30, 2010, Respondents submitted to EPA their signed version of the access agreement; it included many of the terms demanded by TxDOT but not the objectionable indemnifications. *Id.* ***Both versions had attached as exhibits the agreed upon details regarding the road and its construction. Thus in these submissions as well as a number of others, EPA was provided with the details on the location and construction of the road across the ROW that EPA incorrectly claims were not provided to it until January 2011.***[13]

5. December 2010

On December 1, 2010, the morning after the TxDOT Unilateral Version was submitted, EPA's counsel made a public statement at the meeting of the Community Awareness Committee ("CAC") for the Site that "best efforts" were no longer relevant, that Respondents now had access to build a road and that if Respondents were not prepared to agree to TxDOT's terms for access, they could perform the work via water access or face stipulated penalties. Appendix, Item 18 (January 5, 2011 Letter at 17).[14] Respondents received the TxDOT Unilateral Version that day and immediately raised their objections to its indemnities

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[13] ***EPA claims that "Respondents' delay in defining the description and location of the road access . . . made it difficult for EPA or TX DOT to approve a road on the TX DOT property" and in turn, Respondents "blamed the delayed approval by EPA and TX DOT on their inability to reach an agreement with TX DOT." February 16 Letter at 4. In any event, it is unclear what circumstances EPA is referring to in this statement. Respondents provided information about the description and location of the road to EPA and TxDOT on a timely basis (beginning as early as March 2010), and ultimately, it was the unreasonable access terms contained in the TxDOT Unilateral Version and EPA's embrace of these terms that caused delay in reaching an access agreement with TxDOT.***

[14] Based on the February 16 Letter, EPA does not dispute the statement attributed to its counsel at this meeting.

and certain other terms with both EPA and TxDOT. Appendix, Item 27 (TxDOT Chronology at 27-28).

During early December, Respondents continued to press TxDOT to resolve the remaining issues in dispute. This included repeated attempts to contact TxDOT's counsel by telephone and emails to TxDOT's counsel in order to discuss the remaining issues. *Id.* at 28-30. TxDOT's position, as of December 10, 2010, was that the only "terms" it was prepared to discuss were those contained in the TxDOT Unilateral Version; in other words, it was not prepared to discuss or negotiate any terms. *Id.* at 30. This followed a call between EPA's counsel and TxDOT's counsel, on December 6, 2010, during which EPA's counsel apparently "conveyed agreement" to TxDOT with the terms demanded by TxDOT. *Id.* at 28-29.

Respondents pressed EPA to withdraw its apparent approval of the terms demanded by TxDOT in the TxDOT Unilateral Version. *Id.* These were efforts that EPA in its "Response to Respondents' Daily Summary of Access Efforts (December 2010)" attempts to dismiss as not an effort to obtain access but which, in fact, were part and parcel of those efforts.[15] EPA claims to have never "approved" the terms demanded by TxDOT, including the objectionable indemnities (February 16 Letter at 7), but EPA's counsel apparently does not deny that EPA had "conveyed agreement to TxDOT" regarding such terms.[16]

TxDOT's counsel refused to have any discussions with Respondents' counsel until December 14, 2010, and then was available only on two days before the end of the year – December 17, 2010 and December 20, 2010. *Id.* at 30. He also declined to make anyone else available to discuss access after December 20, 2010. *Id.* at 31-32. In these limited two days of discussions, the parties were able to work on language related to several of the problem areas in the agreement, but TxDOT remained inflexible and unwilling to reconsider its

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[15] Respondents' Position Regarding December Access Efforts (Appendix, Item 31) addresses this issue in more detail.

[16] EPA's Log Comments contain an acknowledgement that EPA "did not have an issue" with such terms. *See* Appendix, Item 31 at 15.

position on the central sticking point - indemnification against TxDOT's own negligence, gross negligence and willful conduct. *Id.*

EPA in its comments on Respondents' December 2010 access efforts and in the February 16 Letter now seeks to characterize Respondents' efforts as displaying "no sense of urgency" and claims Respondents focused on complaining about the objectionable terms or challenging the viability of "water only" access as an alternative to access via the TxDOT ROW. February 16 Letter at 6.[17] In fact, given the time constraints imposed by TxDOT on any discussions and TxDOT's unwillingness to change its position on the indemnities for its own negligence, gross negligence and willful conduct, what else was to be done? Notwithstanding EPA's assertions, no amount of "brainstorming" on possible revisions to the agreement would have changed the situation. This is underscored by the fact that the impasse with TxDOT over access was quickly resolved once TxDOT, on January 13, 2011, indicated it was prepared to withdraw its demand for the indemnities.[18]

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[17] In these comments, EPA's counsel singles out International Paper's counsel as not vigorously offering "solutions" and draft language during these December discussions with TxDOT. In fact, as noted above and addressed in Respondents' Position Regarding December Access Efforts (Appendix, Item 31), Respondents have always coordinated their efforts regarding access, so that proposals being made by MIMC's counsel were part of that joint and coordinated effort. To the extent that specific proposals were made by MIMC, the limitations of time due to TxDOT's counsel's imminent departure from the office made Respondents' usual practice of providing coordinated joint comments or proposed language impractical. In addition, EPA's comments ignore the fact that Respondents had worked for months to address TxDOT's position, and TxDOT's intransigence in the face of EPA's apparent approval of its position, made further discussions largely futile.

[18] ***EPA also suggests that Respondents abandoned efforts to obtain access from TxDOT in order to "spen[d] the latter part of the month challenging EPA's position that access to conduct the TCRA Work was possible from the water." February 16 Letter at 6. While Respondents did focus on the lack of technical justification for the risks of "water only" access during the latter part of December (while TxDOT's counsel was unavailable for further discussions), it was not at the expense of continuing to assess the options available in light of TxDOT's position. Moreover, EPA's counsel had informed Respondents' counsel that the Anchor November 1 Memorandum was not sufficient and more detail was needed to justify Respondents' position regarding water-only access. Therefore, Respondents' work on addressing the "water only" access scenario was undertaken to respond to this request from EPA's counsel.***

6. January 2011

Communications with TxDOT's counsel resumed after the New Years' holiday, and included calls to TxDOT's counsel, internal discussions about such discussions and potential alternatives for breaking the impasse, and steps to finalize revised language in portions of the access agreement and a new exhibit intended to clarify the scope of one of the indemnity obligations. *Id.* ***The February 16 Letter seeks to characterize Respondents as not diligently moving forwarding in January with discussions with TxDOT. The record, however, shows Respondents did in fact move forward, but any "progress" was limited by TxDOT's continuing insistence – at least until late on January 13, 2011 - on the objectionable indemnity language.***

The turning point occurred late on Thursday, January 13, 2011, when TxDOT's counsel circulated a revised access agreement (subject to approval by TxDOT management) that did not include the objectionable indemnities. *Id.* at 35-36. Respondents promptly began work on a final agreement with TxDOT, including seeking TxDOT's approval to use a portion of the ROW for an equipment turnaround area and some storage of equipment and materials ("Turnaround Area"). *Id.* at 36. An agreement with TxDOT was in final form and signed within a few days later, on January 21, 2010. ***EPA points to Respondents' request to TxDOT to include the Turnaround Area in the final agreement as having further delayed access. February 16 Letter at 5. In fact, (1) the Turnaround Area was included as one of the steps taken by Respondents to address the inability to gain access to the Big Star property, and (2) adding the Turnaround Area did not delay a final agreement, which was worked out and signed by Respondents within five business days after Respondents received the January 13, 2011 email. Id. at 34-36.***[19]

[19] Monday, January 17, 2011 was a holiday, although Respondents continued to work on open issues related to the TxDOT agreement on that day. As documented by the TxDOT Chronology (Appendix,

Concurrently with concluding the TxDOT agreement, Respondents were concluding a series of agreements to provide for the activities planned for the Big Star property, as further described below. Thus, once TxDOT withdrew its demand for the indemnities for its own negligence, gross negligence and willful conduct, Respondents were able to quickly proceed with the steps necessary to obtain access, modify the RAWP to reflect the revised access arrangements and then quickly proceed to build a road across the TxDOT ROW so that work could begin.

In light of the above, EPA has no credible basis for rejecting the *Force Majeure* Claim on the basis that Respondents failed to use "best efforts" to obtain access from TxDOT or for failing to recognize the role its own actions played in frustrating the purpose of the AOC and in preventing Respondents from timely obtaining access. EPA's statements about instances in which Respondents supposedly delayed or did not vigorously pursue access from TxDOT are simply wrong. The above also demonstrates that the record does not support EPA's linchpin claim that Respondents' inability to timely obtain access from TxDOT was due to their adoption of an "incremental" approach to obtaining access.

VII. THE UNREASONABLE DEMANDS MADE BY BIG STAR – AND NOT ANY PURPORTED "POOR ALLOCATION OF RESOURCES" OR OTHER REASON CITED BY EPA – LED TO RESPONDENTS' INABILITY TO OBTAIN ACCESS TO THE BIG STAR PROPERTY.

EPA also rejects the sufficiency of Respondents' efforts to obtain access to the Big Star property. The February 16 Letter contains an incomplete and flawed summary of the relevant facts related to Respondents' efforts to secure access to the Big Star property. The conclusion that Respondents failed to secure such access as a "direct result of Respondents' poor allocation of resources" is without any factual basis. The same is true of EPA's

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Item 27), Respondents counsel also worked on resolving access issues on other holidays, including Christmas Eve and New Years Eve, and up to and during the Thanksgiving holiday.

contention that Respondents' access efforts failed because they demanded "free use" of Big Star's property. Respondents' inability to obtain access was the direct result of:

- Big Star's eleventh hour demand for a complete release of potential CERCLA liability, for a commitment by Respondents to perform remediation if Big Star's property and to provide indemnities – along with rent – for the use of its property;
- EPA's invitation to Big Star to demand those terms in a signed leased agreement and EPA's subsequent failure to characterize those terms as unreasonable; and
- EPA's unwillingness to address Big Star's status as a PRP at the Site or to order Big Star to provide access.

In the course of the ultimately unsuccessful efforts to obtain access to the Big Star property, Respondents and their counsel devoted enormous efforts toward addressing Big Star's concerns and attempting to obtain access. Moreover, EPA's delay in addressing Big Star's status as a PRP continues to have implications for the remediation of the Site, as Big Star most recently demanded (and Respondents had little choice but to pay) $25,000 for access to its property in January 2011 for two days of sampling required under the UAO.[20]

The February 16 Letter states that EPA will not be able to make any determination regarding Big Star's PRP status for several more years, until the RI is completed and a feasibility study for the Site is completed. February 16 Letter at 5. It is not apparent why so much additional time is required. Respondents have repeatedly provided to EPA documentation regarding dredging activities that took place on the Big Star property under an Army Corps of Engineer permit obtained by a Big Star sister company, Houston International Terminal ("HIT"). In that permit application, HIT represented that it was the owner of the property. That dredging activity appears to have undermined a portion of the levee that served as containment for Western Cell and appears to be the cause of releases at the Site. Appendix, Item 28 (Big Star Chronology at 20 and Item 18 (January 5, 2011 Letter, Exhibit 33 to Daily Log). Big Star sought to avoid liability associated with the dredging activity, by

[20] Big Star's demand for payment for access for sampling is addressed in the Big Star Chronology (Appendix, Item 28 at 26-27).

conditioning the short term use of its property on Respondents' full release of all claims against it and in demanding that Respondents remediate contamination on its property for TCRA construction activity associated with the dredging activity.[21] Whatever inability to pay issues Big Star might have, it could have contributed to the remediation of the Site by granting access. Instead, encouraged by EPA's invitation to it to submit a "wish list" of its demands in a signed lease agreement, Big Star demanded releases, indemnities, remediation and payments approaching $200,000 for the short term use of a portion of its property.

The following is a summary of Respondents' efforts to obtain access from Big Star, together with a description of their efforts to identify alternatives to Big Star. EPA's Log Comments requests additional information as to the timing and nature of Respondents' efforts to identify alternatives to the Big Star Property. That information, based on the Alternative Site Search Statement (Appendix, Item 29), is included in the summary below. As was the case with TxDOT, responses to specific comments or claims by EPA in the February 16 Letter are in bold and have been italicized. The events related to access to the Big Star property are as follows:

- In February 2010, Respondents obtained access to the Big Star property. Respondents sought such access from Big Star so that they could, in the first instance, conduct certain sampling on the Big Star property pursuant to the terms of the UAO and conduct certain construction activities under the anticipated AOC.
- In February, 2010, Big Star signed a "Consent to Access" document ("Big Star Consent"). Appendix, Item 4 (February 16, 2010 UAO Best Efforts Letter, Exhibit 11). It granted access for the sampling and for other activities, including use of the property for a construction material storage and laydown area. Big Star's president, however, indicated that Respondents would need to obtain approval for the specifics of

[21] EPA notes in its Log Comments that Respondents' statements to Big Star that they intend to sue it "was not the way to obtain access." See Appendix, Item 31 (Respondents' Position Regarding December Access Efforts at 55). But EPA fails to note that Respondents offered a "standstill" during the period of the lease with respect to such claims and proposed to address them only after the TCRA had been completed and the waste impoundments had been stabilized. *Id.* In the spirit of full disclosure, Respondents mentioned to Big Star that it has liability at the Site as a result of the dredging activities on its property, but Respondents did not threaten Big Star with litigation in order to obtain access. Moreover, Big Star's own counsel should have counseled Big Star on its potential CERCLA liability, and presumably did so.

subsequent sampling and other access pursuant to subsequent addenda to the Big Star Consent. [22]

- In April 2010, Respondents negotiated with Big Star an addendum to the Big Star Consent that authorized Respondents to collect sediment samples in furtherance of the EPA Action Memorandum dated April 2, 2010 for the TCRA and the UAO. Appendix, Item 28 (Big Star Chronology at 1). Soon thereafter, on May 12, 2010, Respondents negotiated a second addendum to the Big Star Consent that authorized Respondents to collect sediment samples required by the UAO. *Id.* at 2.

- For the first several months after the AOC was issued in May 2010, and until a technical alternative was selected and detailed planning for the construction began, Respondents were not in a position to specifically identify what activities might need to take place on the Big Star property and therefore were not in a position to approach Big Star about a Laydown Area on its property. *Id.* at 2. Based on prior dealings with Big Star and its counsel, Respondent had no reason to believe that Big Star would be unwilling to negotiate acceptable access arrangements for future work to be conducted at the Site. *Id.*

- In mid-August, Respondents' contractor concluded that the Big Star property would provide the most appropriate location for various activities related to the project (an area for storage of material and equipment, a turnaround area, offices, dock facilities, etc.) *Id.* Among other things, large construction vehicles could be moved to the waste impoundments from the Big Star property without using public roads, and the property could be used to load barges that would be used to place some of the material in the Eastern Cell. *Id.* This decision was in part based on limitations that TxDOT had previously sought to impose regarding use of the ROW to store construction materials or park equipment, due to concerns about possible damage to the I-10 bridge and roadway. ***It is not the case, as EPA claims (February 16 Letter at 5), that Respondents therefore wasted four months negotiating with TxDOT about placing a laydown area on the ROW before initiating discussions with Big Star.***

- Beginning in August and continuing over the next several months, Respondents initiated discussions with Big Star's president, Jay Roberts, about the specifics of use of the Big Star property for a Laydown Area. This use was already authorized by the Consent to Access but not in the area of Big Star's property where Respondents' contractor had ultimately determined the Laydown Area would need to be located. A number of issues arose and were addressed by Respondents in the course of these discussions, among them, the pending foreclosure sale of the Big Star property, vandalism and security issues and concerns by Big Star about access across the TxDOT ROW to pole signs that Big Star asserted were located on its property. Appendix, Item 28 (Big Star Chronology at 2-14).

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[22] Big Star initially was not represented by counsel. It then engaged counsel, John Dugdale of Gordon & Rees, who was involved in addressing sampling activities under the UAO on what Big Star claimed to be Big Star's inundated property. By May 2010, Mr. Dugdale had notified Respondents' counsel that he was withdrawing from the representation. For the next several months, the point of contact was again with Big Star's president, Jay Roberts. As of October, 2010, Big Star again engaged counsel (William Morgan), and subsequent communications were with him.

- Respondents worked on these issues, and by late September, Big Star had tentatively agreed to provide access for a Laydown Area, subject to review by the company's business counsel of an addendum to the Big Star Consent containing such terms. *Id.* at 2-4. During this timeframe, Respondents were also seeking access from Big Star to install additional fencing to secure the waste impoundments and preparing a plan for sampling of the proposed Laydown Area. *Id.* at 4-6. The sampling plan was submitted to EPA on October 15, 2010. *Id.* at 6.

- On October 19, 2010, Mr. Roberts forwarded a lease form that the company's business counsel suggested be used for a lease for the Laydown Area (in lieu of providing for the lease of the Laydown Area as part of an addendum to the Big Star Consent). *Id.* at 7. Respondents, based on the form lease and the terms reflected in the addendum to the Big Star Consent they had previously negotiated with Mr. Roberts, promptly began working on a draft lease. *Id.* at 8. They also continued work on obtaining EPA comments and approval for a sampling plan for the Big Star property and obtaining access to conduct a wetlands delineation/endangered species survey ("Survey") on the Big Star property needed for the TCRA. *Id.* Both activities continued into early November. *Id.* at 8-10.

- By early November 2010, Respondents had concerns as to (1) whether EPA would ultimately allow a Laydown Area on the Big Star property; ad (2) possibility that an agreement could not be concluded with Big Star due to, among other things, the pending foreclosure on the Big Star property. Respondents began evaluating alternatives to the Big Star property while continuing negotiations with Big Star. Appendix, Item 28 (Big Star Chronology) and Item 29 (Alternative Site Search Statement);

- Early in those efforts, one potential alternative was identified (the Williams Brothers property), but attempts over the next several weeks to discuss a lease of the property with the property owner were unsuccessful. Appendix, Item 29 (Alternative Site Search Statement at 1) and Item 28 (Big Star Chronology at 12 and 15). Respondents ultimately learned in early December that the owner was not interested in leasing or selling the property because of pending highway contracts that might require use of the property. Appendix, Item 29 (Alternative Site Search Statement at 1) and Item 28 (Big Star Chronology at 15).

- There were a limited number of other locations that could serve as a Laydown Area, Respondents therefore began evaluating how to split activities planned for the Big Star property among several locations, and then focused on locating a parcel that would have the marine access that was critical to perform portions of the TCRA work. Appendix, Item 29 (Alternative Site Search Statement at 1-2) and Item 28 (Big Star Chronology at 15). In anticipation that it might be necessary to split activities planned for the Big Star property among other locations, Respondents began discussions with the material suppliers about storing some of the material at the suppliers' locations. Appendix, Item 29 (Alternative Site Search Statement at 2-3).

- Respondents also continued to press EPA to approve the sampling plan and Big Star to address the lease terms and to grant access for the sampling and the Survey. The sampling plan was approved and an access agreement for sampling and the Survey (Third Addendum to the Big Star Consent) was reached on November 11, 2010.

Appendix, Item 28 (Big Star Chronology at 12). Respondents immediately made arrangements for the sampling and Survey to be performed. *Id.*

- On November 30, 2010, unvalidated data from the sampling was received and provided to EPA and Big Star. *Id.* at 14. The following day, Big Star's counsel informed Respondents he would not discuss terms for a Laydown Area lease until he was able to discuss the sampling results with EPA and Respondents promptly informed EPA's counsel of the situation. *Id.* at 15. By this time, Respondents had engaged in efforts, both directly and through real estate brokers, to identify all potential alternative sites that could serve to satisfy some or all of the functions planned for the Big Star property, and was in the process of assessing possible options. Appendix, Item 29 (Alternative Site Search Summary at 1-2).

- On December 2, 2010, EPA's counsel informed Respondents that EPA should have a response on Big Star sampling data by the following day, but also notified Respondents that she had asked Big Star to submit a signed access agreement containing terms that were acceptable to Big Star. *Id.* at 16. This occurred as the December 8, 2010 deadline for commencement of TCRA construction was approaching.

- On December 3, 2010, Respondents were able to secure access from Big Star for the limited purposes of installing fencing and EPA-authorized signs on the Big Star property. *Id.* at 17. On the same day, Big Star also submitted its lease terms to EPA. *Id.*

- Apparently emboldened by EPA's reluctance to name it as a PRP, Big Star submitted a signed lease to EPA that provided for: (1) rent of $15,000 per month, (2) an initial payment of $25,000, (3) a release by Respondents of all claims (including CERCLA claims against Big Star and related persons, and (4) obligations on the part of Respondents to remediate contamination on the Big Star property and to indemnify Big Star. *Id.*

- In discussions in response to this proposal, Respondents offered terms that included rental payments of $7,500 per month and told Big Star's counsel that they were open to further discussions regarding lease terms. Much as Respondents were experiencing at the same time with TxDOT after the EPA invited it to submit its demands to EPA in a signed, unilateral access agreement (*i.e.*, the TxDOT Unilateral Version), Big Star was unwilling to discuss any terms other than those it had included in the lease. *Id.* at 18-20. As noted above, those terms included a demand for a complete release. ***Respondents offered rent to Big Star, so the statement in the February 16 Letter that Respondents demanded that Big Star "grant free use of its property" is simply not accurate. February 16 Letter at 5. As addressed below, it was Big Star's insistence on a complete release and other terms, and not any demand on Respondents' part that Big Star "grant free use of its property" that caused the negotiations with Big Star to fail.***

- Rather than inform Big Star that the terms it was seeking were unreasonable (particularly in return for short-term access), EPA's counsel, in fact, questioned why Respondents were opposed to releasing Big Star, since Big Star appeared to have limited financial resources. Appendix, Item 28 (Big Star Chronology at 18). In doing

so, EPA ignored its own guidance that requires even those parties with limited resources to provide access even if they cannot contribute financially to a cleanup.[23]

- Requests to EPA's counsel throughout December to address Big Star's status as a PRP and to visit with Big Star regarding the unreasonableness of its lease demands were unsuccessful, and EPA's counsel did not even respond to repeated calls and emails from Respondents' counsel as the month progressed. *Id.* at 18-24.

- In January 2011, as Respondents made further efforts to have EPA assist in convincing Big Star to withdraw the unreasonable terms it was demanding. *Id.* at 24. EPA's counsel's response, however, was to provide Big Star with "inability to pay" documentation to complete, ignoring the fact that as a potential PRP, Big Star could have and should have been required to provide access. *Id.*

- For a number of months, the possible foreclosure sale of the Big Star property (to satisfy a creditor's judgment against Big Star) had been a concern and threatened to derail any agreement that might be reached with Big Star. During December and continuing into January, Respondents explored the possibility of leasing the Big Star property from a judgment creditor of Big Star, who had a pending proceeding to foreclose on the property. Appendix, Item 28 (Big Star Chronology at 23-24). ***These efforts would appear to be "brainstorming" and "thinking outside the box" of the kind EPA's counsel had told Respondents' counsel were necessary to demonstrate best efforts. Yet in the February 16 Letter, EPA's counsel seeks to dismiss such efforts in her comments on Respondents' access efforts during December. See Appendix, Item 31 (Respondents' Position Regarding December Access Efforts at 88 and 95).***

- As the above activities involving access to the Big Star property were unfolding, Respondents were continuing their efforts to locate alternatives to the Big Star property. In mid-December, Respondents had made arrangements with material suppliers to store construction materials at the suppliers' facilities and had also identified a potential property for material storage and with marine access (the LaBarge property), and had been evaluating its suitability and negotiating a lease for its use for the TCRA. Appendix, Item 29 (Alternative Site Search Summary at 3). They also had identified and were also working on leasing an alternative site for construction offices (the administration site). *Id.* Once it became clear in early January that Big Star was not prepared to change its demands, Respondents worked to conclude leases for the LaBarge property and the administration site. *Id.*

- Once the impasse with TxDOT ended, Respondents sought approval from TxDOT for limited material and equipment storage and a truck turnaround area on the ROW. Appendix, Item 27 (TxDOT Chronology at 36). They also concluded leases for the LaBarge property and the administration site. *Id.* at 37. The addition to the access agreement with TxDOT and the leases of the LaBarge property and the administration site, together with the previously concluded arrangements with the material suppliers, provided alternatives for the activities that would otherwise have occurred on the Big Star property. Appendix, Item 29 (Alternative Site Search Summary at 3).

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[23] This issue was addressed in Respondents' January 5, 2011 letter to EPA (Appendix, Item 18 at 15).

In light of the above, EPA has no basis for rejecting the sufficiency of Respondents' efforts to obtain access to the Big Star property. Moreover, it was EPA's actions which form the basis of Respondents' Breach of Contract Claim that were the immediate and direct reason why Respondents were unable to secure access to the Big Star property.

VIII. EPA'S POSITION THAT IT TOOK "PROGRESSIVE STEPS" TO FACILITATE ACCESS NEGOTIATIONS AND DID NOT INTERFERE IN ACCESS NEGOTIATIONS IS AT ODDS WITH THE RECORD.

Respondents have documented in detail in the January 5, 2011 Letter how EPA interjected itself in access negotiations with TxDOT and Big Star in a manner that directly impeded those discussions, thus frustrating the purpose of the AOC and breaching EPA's obligations of good faith and fair dealing under the AOC. In the case of TxDOT, EPA's actions contributed to delay in obtaining access in the case of Big Star, EPA's actions resulted in an inability to obtain access and the need to revamp the construction process to accommodate alternative access arrangements (in five different locations).

EPA's apparent embrace of the terms of the TxDOT Unilateral Version caused TxDOT to refuse to entertain discussions regarding access for several weeks. Then, once TxDOT relented, the time limitations (resulting from TxDOT's counsel being out of the office during the last ten days of December and his inability to designate any one to act on behalf of TxDOT during his absence), prevented any additional discussions during the remainder of 2010.

The same thing occurred with respect to Big Star. Once Big Star had submitted to EPA, at EPA's invitation, a signed lease agreement containing its unilateral terms for use of its property as a Laydown Area for the TCRA construction, EPA then refused to participate in good faith negotiations with Respondents related to the lease terms. EPA also dismissed Big Star's potential liability as a PRP and responsibility to provide access for purposes of the TCRA – even in the face of its claimed inability to pay – as a means of satisfying its liability at the Site.

EPA's apparent response to that showing is to reference telephone calls and meetings it had with TxDOT and Respondents to discuss access. February 16 Letter at 6. While characterizing these steps as "efforts to move the negotiation process forward," EPA never addresses the merits and substance of its actions – in particular, its invitation to TxDOT and Big Star to condition access on terms they unilaterally set, its reluctance to consider using its order authority, its apparent approval of the unreasonable terms on which TxDOT and Big Star sought to condition access, and its continued unwillingness to address Big Star's status as a PRP. Thus, EPA has failed to refute the demonstration made by Respondents of EPA's interference in their efforts to gain access and EPA's breach of its obligations under the AOC.

IX. SINCE LAND ACCESS, AS WELL AS A STAGING AREA AND BARGE ACCESS, WERE NECESSARY TO PROCEED WITH CONSTRUCTION ON THE EASTERN CELL, EPA HAD NO BASIS FOR CONCLUDING THAT RESPONDENTS' *FORCE MAJEURE* CLAIM DID NOT APPLY TO ACTIVITIES ON THE EASTERN CELL.

The February 16 Letter states that EPA "cannot" excuse performance of the TCRA Work activities for the Eastern Cell and that the *Force Majeure* Claim is irrelevant to work on the Eastern Cell. February 16 Letter at 3. It does so based on the erroneous conclusion that "work on the Eastern Cell was always planned to be performed from barge-mounted cranes [so that] lack of land access across the TxDOT ROW could not constitute a *force majeure* event that would excuse Respondents from timely beginning and proceeding with work on the Eastern Cell" and "these planned Work activities do not require an access agreement with TxDOT for implementation." *Id.* at 3 and 8.

Work on the Eastern Cell involved placement of geotextile and rock to form an "armor cap." TCRA planning contemplated that some - but not all - of the rock used in armor cap construction on the Eastern Cell would be placed using barge-mounted cranes. Appendix, Item 30 (Technical Response at 1-2). Much of the rock, however, was always planned to be placed from the land side, using cranes located on a central berm and with the surface of the

Eastern Cell being gradually built out from the land side. *Id.* It was never contemplated that all of the work on the Eastern Cell would be performed from the water.

The RAWP (approved by EPA on November 8, 2010) and the Construction Schedule (approved by EPA on December 15, 2010) expressly reference the "land side" work to be performed on the Eastern Cell. Having approved these documents, it is not apparent how EPA can claim that all of the work on the Eastern Cell was planned to be performed from the water. The Construction Schedule and Figure 3-1 of the RAWP (Exhibits A and B respectively to the Technical Response) show the following:

- the majority of one type of rock, Cap Type B, was to be placed in the Eastern Cell, as shown in Figure 3-1;
- under the Construction Schedule, 15 of the 24 days estimated for Cap Type B placement (representing over 60% of the effort required to place Cap Type B material) were planned to occur from the land;
- according to Figure 3-1, the majority of another type of construction material, Cap Type E, was to be placed in the Eastern Cell;
- the Construction Schedule shows that ten of the 42 days estimated for the task of placing Cap Type E were to be performed from the land; and
- work in the Eastern Cell would also involve the installation of other types of cap material (A, C and D) and the Construction Schedule included estimates for land side placement of each of those types of materials.

Furthermore, even though some of the work on the Eastern Cell was planned to be performed using barge-mounted cranes (for placement of geotextile material and rock), this does not mean that Respondents could have performed even that work without having land access.[24] Any barge-based work on the Eastern Cell required land-based activities to support the work. Appendix, Item 23 (Respondents' February 14, 2011 Notice of Dispute, Exhibit B).

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[24] This issue was addressed in Respondents' February 14, 2011 Dispute Notice (Appendix, Item 23) in response to an NOV issued by EPA involving failure to commence installation of geotextile on the Eastern Cell by the start date in the Construction Schedule. It was also addressed in the April 4, 2011 Dispute Notice (Appendix, Item 26) with respect to the placement of a type of rock on the Eastern Cell, again based on the start date in the Construction Schedule.

An area to store construction materials and a dock for loading the materials on the barges for subsequent placement on the Eastern Cell were required. *Id.* Those locations were not available due to the inability of Respondents to obtain an agreement with Big Star, one of Respondents' claimed *force majeure* events, and EPA interference with Respondents' performance of their obligation under the AOC. Even assuming for purposes of argument that construction materials had been available for the work on the Eastern Cell, land access via the TxDOT ROW was needed in order to perform surveying. The surveying was required to identify the locations for placement of the geotextile and then rock on the Eastern Cell, using the barge-mounted cranes. *Id.* Land-based equipment would have been required to secure the geotextile in certain areas of the Eastern Cell. *Id.* Land-based emergency access to protect worker health and safety was also needed before any water-based activity on the Eastern Cell could proceed. *Id.* Thus, for any work on the Eastern Cell to proceed – even work planned to be performed from the water - land access over the TxDOT ROW was required.

X. THE RISKS AND ENVIRONMENTAL IMPACTS ASSOCIATED WITH "WATER ONLY" ACCESS WOULD NOT BE MINIMAL OR EASILY MITIGATED. FURTHERMORE, PERFORMING THE WORK WITH "WATER ONLY" ACCESS WOULD HAVE CREATED A SIGNIFICANT DELAY AND WOULD MEAN THAT THE COMPLETION DATE IN THE CONSTRUCTION SCHEDULE COULD NEVER HAVE BEEN MET.

Months after the parties signed the AOC, EPA interjected "water only" access into the RAWP over Respondents' objections. EPA has since continued to insist that it is an equivalent alternative to the "combined" access scenario on which the Construction Schedule was based. EPA also claims, without substantiation, that the Construction Schedule – developed, as EPA was well aware, assuming a combined access scenario – contained sufficient "flexibility" to allow the work to be completed via "water only" access by the date

(September 2, 2011) originally set by EPA as the TCRA construction completion date. February 16 Letter at 3.

EPA continues to take that approach in the February 16 Letter, relying on the January 21 Memorandum and asserting that any risks of a "water only" access scenario would not be significant or could be mitigated simply by adopting mitigation measures planned for "water work" on the Eastern Cell. February 16 Letter at 3-4. The January 21 Memorandum addresses technical and safety issues with respect to a "water only" access scenario identified in the Anchor November 1 Memorandum, but it does not address additional issues associated with "water only" access that were discussed during the November 18, 2010 meeting with Samuel Coleman, EPA Superfund Division Chief (and subsequently described in Respondents' January 5, 2011 Letter) or in Respondents' Dispute Notices. Those additional issues involve issues such as the size of the cranes that would be required and the logistical challenges in bringing them to the Site, and they are addressed in Respondents' Technical Response. All of the issues related to marine access are addressed in the Technical Response. See Appendix, Item 30. As discussed below, the Technical Response demonstrates that EPA has improperly dismissed both the risks of a "water only" access scenario and ignored the additional time that would be required to complete the work under such a scenario.

A. EPA's Assessment Of The Risks Of "Water Only" Access Is Based On The Erroneous Assumption That All Work On The Eastern Cell Was Always Planned To Be Performed From The Water, And Fails To Take Into Account The Environmental, Health And Safety Risks Of A "Water Only" Access Scenario.

EPA's rejection of Respondents' *Force Majeure* Claim is based on the erroneous assumption that the *Force Majeure* Claim did not apply to the Eastern Cell. The January 21 Memorandum states that mitigation measures applicable to work on the Eastern Cell could be applied to address impacts associated with work in the Western Cell. This statement seemingly assumes that no additional "water work" would occur on the Eastern Cell under a

"water only" access scenario. That assumption ignores the provisions in the EPA-approved RAWP and Construction Schedule showing that major portions of the work on the Eastern Cell was to be performed from the land. The notion that mitigation measures planned for the water work on the Eastern Cell could simply be applied to the Western Cell should be rejected as an attempt to minimize the environmental and other risks associated with "water only" access.

The Technical Response demonstrates the extent to which EPA's January 21 Memorandum fails to fully identify and assess the full risks associated with water only access. It contains an item by item response to statements contained in the January 21 Memorandum. It documents that not all of the work on the Eastern Cell was planned to be performed from the water. Appendix, Item 30 (Technical Response at 1-2). It demonstrates why performing the work without land access would have required more and larger marine vessels and would have significantly increased the risk of resuspension of sediments due to prop scouring resulting from the use of these vessels. *Id* at 5. It also demonstrates that the magnitude of such risks could not be mitigated simply by adopting measures applicable to performing work using smaller barge-mounted cranes for limited activities on the Eastern Cell as part of a combined access scenario. *Id.* The Technical Response also assesses the additional risk to worker health and safety associated with a "water only" access scenario. *Id.* at 10.

B. Notwithstanding Any "Flexibility" In The Construction Schedule, Significant Delay Would Have Resulted Had Respondents Abandoned Efforts To Obtain Land Access And Elected To Perform The TCRA Solely From The Water.

The February 16 Letter states that there was sufficient "flexibility" in the Construction Schedule to have completed the TCRA by the original completion date (February 16 Letter at 3), but does not identify how that might have been accomplished. This statement is also presumably based on EPA's erroneous assumptions about the extent of additional water work that would be required under a "water only" access scenario.

The Technical Response contains an assessment of the schedule for performing the TCRA with water only access. It assumes that delays would occur first in mobilizing for construction and then later, during the construction process itself. Appendix, Item 30 (Technical Response at 17-19). It concludes that mobilization to perform work on the waste impoundments under a "water only" access scenario could require three to four months. It also addresses the slower pace of construction that would occur in a "water only" access scenario. This would add additional months to the time required to complete the work.

The mobilization issues associated with "water only" access include the need for different equipment as well as additional site preparation work required to accommodate the larger cranes and barges. Among the mobilization issues are the following:

- Construction of Landing Area. "Water only" access would involve constructing a landing area. The construction of this landing area would require Harris County approval (because of the platform's potential impact on the River's elevation), a process that could require an estimated eight to 12 weeks. *Id.* at 17.

- Need for Larger Cranes and Associated Logistical Problems. A "water only" access scenario would require use of larger barge-mounted cranes that could provide an appropriate amount of "reach" into the impoundments. *Id.* at 4. These cranes would have to be larger than those planned for use in a combined access scenario, and would first have to be located and might not be available. *Id.* Respondents would then be required to bring these larger cranes to a location north of the I-10 bridge in sections and then re-assemble the cranes. *Id.* This is because the clearance of the I-10 bridge (approximately 22 feet) would not have allowed a full crane assembly to pass beneath the bridge. Appendix, Item 23 (February 14, 2011 Dispute Notice at 6-7). To accommodate that process, a suitable crane assembly location would have had to be identified with barge berthing capabilities to transload and secure the cranes onto the barges, which would significantly narrow Respondents' options in locating a suitable property. The barges and cranes would then have had to be transported to the waste impoundments and placed in fixed positions. *Id.*

- Need for Additional Site Preparation Work. Additional site preparation work to provide berthing facilities for large work boats and craft would also be required. The additional site preparation work would include pile driving, pier and berth construction, and implementation of shoreline stabilization measures in addition to those that would be required under a combined access scenario. Appendix, Item 30 (Technical Response at 2).

Actually performing the work would also require much longer under a water only access scenario, a minimum of several months and potentially much longer than under a combined access scenario. *Id.* at 18. The reasons include:

- Added Transit Time from LaBarge Property to the TCRA Worksite. The pace of work would be slower without the ability to work from the land side in tandem and the time involved transporting and placing rocks that form the armor cap, in this instance from an area two miles upriver (the LaBarge property) rather than from the Big Star property immediately adjoining the waste impoundments. *Id.* at 4 and 18. At least 400 additional barge trips would likely be required under a water only access scenario (a total of at least 513 trips, in contrast to about 113 under the combined access scenario.) *Id.* at 4. Each trip to or from the LaBarge property would require at least an hour and additional time for unloading. *Id.* Based on four hundred additional round trips, simply bringing material and personnel to the impoundments would require in excess of 800 additional work hours. Transporting material and personnel to the impoundments by barge would consume a significant portion of each work day and would significantly slow the pace of work.

- Delays Due to Need to Accommodate Other Marine Traffic. Potential interference with marine traffic would limit how many barges could be used and could increase the length of the barge trips to bring workers' equipment and construction material to the work site. *Id.* at 18. The larger size and number of barges and cranes required in a water only access scenario would have to be managed to avoid blocking the adjacent navigation channel in the San Jacinto River, and would require coordination of work activities with the Coast Guard, the Port of Houston Authority and the United States Army Corps of Engineers; delays associated with such coordination would impact the pace of work.

- Delays Associated with Working in a Marine Environment. Working in a marine environment is inherently difficult because of the impact of wind, weather, waves and current, and working under a "water only" access scenario would be much more subject to the impact of such conditions. *Id.* at 11. The TCRA work under a combined access scenario demonstrated, among other things, the difficulty of controlling sediment dispersal associated with marine operations. *Id.* at 5.

In light of the above, there is no credible basis for EPA's assertion that a water-only access scenario could have been implemented by the completion date that was developed assuming that the work could be performed using access from both land and water.

XI. RESPONDENTS' KNOWLEDGE AT THE TIME THEY ENTERED INTO THE AOC THAT ACCESS WAS REQUIRED IS IRRELEVANT TO WHETHER A *FORCE MAJEURE* EVENT OCCURRED AND DID NOT PRECLUDE RESPONDENTS FROM MAKING THEIR *FORCE MAJEURE* CLAIM OR THEIR BREACH OF CONTRACT CLAIM.

The February 16 Letter asserts that Respondents "were fully aware that access was required" and that "water work would be necessary to comply with the Work activities." February 16 Letter at 4. These statements, while true, do not render Respondents' *Force Majeure* Claim irrelevant.

Respondents do not dispute that access was required (and they began efforts to obtain access even before they entered into the AOC). Respondents committed, in entering into the AOC, to use their "best efforts" to obtain access. They did so with the expectation that EPA, consistent with its contractual obligations of good faith and fair dealing, would facilitate efforts to obtain access and, if necessary, would exercise its order authority to do so. Instead and as explained at length in Respondents' January 5, 2011 Letter (Appendix, Item 18), what EPA did was to frustrate the purpose of the AOC by (i) interfering in Respondents' access negotiations by inviting TxDOT and Big Star to establish their unilateral access demands in signed documents submitted to EPA, and then (ii) by interjecting the "alternative" of water only access, seek to characterize Respondents' "best efforts" as irrelevant.

As for the need for "water work," Respondents do not dispute that they always contemplated that certain portions of the work would need to be performed from the water. Contemplating that specific tasks might need to be performed via the water, however, is far different from anticipating that the work could be performed without any land access. Moreover, the AOC itself makes no mention of "water only" access. That concept was interjected by EPA later, during the time the RAWP was being developed. It was ultimately included in the RAWP by EPA over Respondents' objections. Appendix, Item 11. No expectation that "water work" might be required can explain EPA's interference in Respondents' efforts to secure land access by inviting TxDOT and Big Star to continue to

demand unreasonable and improper access terms and then threatening Respondents with stipulated penalties if they did not agree to those terms.

XII. EPA'S UNDUE INTERFERENCE WITH RESPONDENTS' ABILITY TO TIMELY OBTAIN ACCESS DEPRIVED RESPONDENTS OF THE BENEFIT OF THE AOC AND WAS A BREACH OF EPA'S OBLIGATIONS OF GOOD FAITH AND FAIR DEALING UNDER THE AOC.

Respondents fully complied with the AOC in using their best efforts to obtain access to TxDOT and Big Star properties under Paragraph 53 of the AOC. EPA, however, failed to assist Respondents in gaining access, pursuant to Paragraph 53 of the AOC, to the extent necessary to effectuate the response actions required by the AOC.

EPA also interfered with and frustrated Respondents' access efforts by, among other things, encouraging TxDOT and Big Star to draft and sign a license agreement and a lease, respectively, containing the terms unilaterally desired by these parties, and then taking the position that Respondents were not using "best efforts" because they would not sign these one-sided, exculpatory agreements containing broad unreasonable indemnities (in the case of both TxDOT and Big Star) and a full release of liability (in the case of Big Star). In addition, certain of the terms for access that EPA declared to be "reasonable" are contrary to Texas law and thus in violation of public policy.[25] It is noteworthy that Respondents were able to proceed with implementation of the TCRA only after TxDOT agreed to withdraw the objectionable indemnity provisions.

EPA also refused and continues to refuse to name Big Star as a potentially responsible party despite evidence provided to EPA by Respondents of the effect that dredging conducted on Big Star's property had on the release of hazardous substances from the waste impoundments. This dredging was conducted pursuant to a permit issued to Big Star's sister

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[25] This issue is addressed in the January 5, 2011 Letter (Appendix, Item 18 at ▒).

company, HIT, based on HIT's representation that it owned the property to be dredged when, in fact, Big Star was the record owner of the property. Respondents contend that if Big Star had been noticed of its potential liability at the Site, Big Star would have had an incentive to cooperate with Respondents to conduct the TCRA and allow access to the Big Star Property. Instead, Big Star insisted on obtaining a full release of liability (in addition to substantial rental payments and unreasonable indemnity provisions) as a condition of the use of its property. This ultimately resulted in Respondents having to lease, at considerable expense, two separate properties (the LaBarge property for construction material storage and dock access, and the Market Street property for construction offices), that were located farther from the Site and required additional truck traffic to bring construction materials to the Site. Thus, EPA also frustrated the purpose of the AOC making performance of the TCRA impracticable.

EPA also, as detailed above (and further addressed in the Dispute Notices), purported to create additional deadlines as a basis for stipulated penalties by purporting to approve the Construction Schedule. EPA did so after precipitating an impasse over access, and sought to obscure the extent to which it was impeding efforts to construct the armor cap by interjecting the supposed alternative of "water only" access into the access discussions.

EPA's actions have frustrated the purpose of the AOC. Respondents regard EPA's actions to rise to a breach of the contractual obligation of good faith and fair dealing that EPA owes to Respondents under the AOC. The AOC is a contract that is subject to interpretation relying on principles applicable to contracts between private parties, including the covenant of good faith and fair dealing. See *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 607-08 120 S.Ct. 2423, 147 L.Ed.2d 528 (2000); *First Nationwide Bank v. United States*, 431 F.3d 1342, 1349 (D.C. Cir. 2005). EPA's breach of its obligations under the AOC goes to whether EPA was justified in rejecting Respondents' *Force Majeure* Claim. It also, in Respondents' view, precludes EPA from seeking to enforce the provisions of the AOC with respect to stipulated penalties.

XIII. CONCLUSION.

For the reasons set forth above, Respondents respectfully request that EPA reconsider and set aside its prior denial of their *Force Majeure* Claim. EPA should also acknowledge that, to the extent that it continues to maintain that Respondents are subject to stipulated penalties for alleged non-compliance with the AOC, that a *force majeure* event occurred that excuses any such non-compliance.

For the reasons set forth above and as addressed in the Dispute Notices, EPA does not have a credible basis under the terms of its contract with Respondents for seeking to subject them to stipulated penalties for alleged non-compliance with the AOC, including the instances of alleged non-compliance identified in the August 5 Letter. EPA should withdraw the August 5 Letter and notify Respondents that it no longer intends to pursue claims against them for stipulated penalties.

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LIST OF MISSTATEMENTS IN EPA'S FEBRUARY 16 LETTER[1]

PAGE(S)	STATEMENT(S)	WHY IT IS NOT CORRECT
1, 5 and 8	**"Respondents ceased work on January 4, 2011."**	Respondents did not stop work on the TCRA on January 4, 2011 or any other date. Submission at 17-19.
5	**". . . Respondents are asking EPA to excuse their nonperformance of all TCRA Work activities starting January 5, 2011, and continuing through the completion of the TCRA, September 2, 2011."**	The relief sought by Respondents is for delay in being able to proceed with certain TCRA tasks as a result of their inability to timely obtain access. Respondents have never claimed that their initial inability to obtain access relieved them of all obligations to complete the TCRA. Submission at 15-16.
2, 3 and 8	**All work on the Eastern Cell was to be performed from the water** "Work on the eastern pit will utilize a materials barge with a mounted excavator or crane and marsh buggy earthwork equipment." (at 2) "According to the TCRA WP, work on the eastern waste pit requires a barge with a mounted excavator or crane to be staged adjacent to the work area according to Respondents." (at 3) "The barges containing the equipment and materials will travel to the work area via the water and will not use the TX DOT property to access the eastern pits." (at 3) "The EPA cannot excuse TCRA work activities for the eastern waste pit because these planned Work activities do not require an access agreement with TX DOT for implementation." (at 8)	The work on the Eastern Cell was always contemplated to be performed using both land and water access, and the Construction Schedule was prepared and all of Respondents' discussions with EPA about plans for the construction proceeded on that basis. Appendix, Item 31 (Technical Response at 1-2). By way of example, the Construction Schedule identifies specific tasks, such as the land placement of a certain type of material (Armor Cap B) that was to be largely placed on the Eastern Cell. *Id.* The construction schedule and the RAWP, both approved by EPA, identified multiple tasks on the Eastern Cell that were to be performed via the land, not the water. Appendix, Item 31 (Technical Response at 1-2) and Submission at 47-49.

[1] Capitalized terms used in this document and not specifically defined have the meaning defined in the Submission to which this document is attached.

PAGE(S)	STATEMENT(S)	WHY IT IS NOT CORRECT
3 – 4	**The only additional risks associated with "water only" access relate to work on the Western Cell and can be mitigated by the measures planned for water work on the Eastern Cell** " . . . the environmental, health, and safety risks for transporting equipment and materials to the western pits via the water are the same for the Work on the eastern pit in the water." (at 3) "The EPA has in place mitigation measures minimizing these risks for the water removal Work planned for the eastern pit." (at 3-4)	As addressed in detail in the Technical Response (Appendix, Item 31), this statement is wrong because: (1) it assumes all work on the Eastern Cell was to be performed via water, which is not true; (2) performing work on the Western Cell via water is materially different - and more risky - than performing work on the Eastern Cell via the water, in part because of the need to construct a landing platform and the risk of resuspension that would result; and (3) the EPA mitigation measures for the Eastern Cell would not adequately address the risks of performing all of the work on the Western Cell from the water.
3	**The Construction Schedule contains "flexibility" to allow the work to be performed with "water only" access by the original completion date (September 2, 2011)** "Currently, there is some flexibility in the EPA approved Work Schedule to minimize the impact of any additional time that may be needed if delivery for the western pit Work is done via water."	The Construction Schedule for the TCRA was prepared assuming both land and water access, and as EPA is aware, all of the planning for construction proceeded on the basis that land access would be available. Performing the TCRA entirely from the water would have required not only additional time to mobilize for construction, but the actual construction process would take longer due to the need to bring all of the construction materials and equipment to the Site via the water. Performing the TCRA entirely via the water would have required a minimum of several months longer and could never have been completed by the original completion date. Appendix, Item 31 (Technical Response at 1-2).
4, 5 and 8	**Respondents decided to adopt an "incremental approach" to negotiations with TxDOT.** "Respondents insisted on negotiating the access agreement with TX DOT in an incremental	The "incremental approach" was required by EPA over Respondents' objections. Appendix, Item 27 (6 at 7-10) and Submission at 23-26.

PAGE(S)	STATEMENT(S)	WHY IT IS NOT CORRECT
	approach preventing performance of their TCRA Work obligations." (at 4) "Respondents elected to negotiate the sampling and the access road agreements incrementally rather than concurrently." (at 5) "Respondents' incremental negotiation approach took nine months to complete. Three of those months were the actual negotiation for the road on TX DOT property." (at 5) ". . . failure to reach an access agreement with TX DOT, was a direct result of Respondents' incremental approach to negotiate the terms of access and not an event beyond their control." (at 8)	
4	**Respondents delayed in performing sampling on the TxDOT ROW.** " . . . Respondents spent another month insisting all the access agreement terms had to be agreed upon between the parties prior to Respondents implementing the sampling plan."	TxDOT, and not Respondents, required this approach. Appendix, Item 27, (TxDOT Chronology at 6-9) and Submission at 23-26.
4	**Respondents failed to timely provide EPA and TxDOT with details regarding the proposed road.** "Respondents had over four months to provide EPA and TX DOT with the preliminary map and specifications of the proposed road during the access negotiations. The final map and specifications were not	EPA was provided with the layout and details regarding the road on the ROW over the course of the negotiations and had that information well before the day (January 4, 2011) on which EPA claims that Respondents "ceased work." Appendix, Item 27 (TxDOT Chronology at 3, 19 and 25-26 and Submission at 35. It is not clear when the four month period referenced by EPA began, as EPA had stated

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	provided to EPA until after Respondents stopped all TCRA Work activities." "The Respondents' delays in defining the description and location of the access directly made it difficult for EPA or TX DOT to approve a road on TX DOT property and in turn Respondents blamed the delayed approval by EPA and TX DOT on their inability to reach an agreement with TX DOT."	that it had to review the TxDOT soil sampling results and approve whether and where a road could be constructed on the TxDOT ROW and it was not until October 25, 2010 (about two months before Respondents allegedly "ceased work"), when EPA finally gave such approval. By the time TxDOT submitted the TxDOT Unilateral Version to EPA on November 30, 2010, TxDOT and Respondents had agreed on the road's location and construction and other details regarding the road – and exhibits containing that information were attached to the TxDOT Unilateral Version. Those same road layout and construction details were in the final agreement with TxDOT, modified to provide for the additional "turnaround" and equipment and material storage areas that TxDOT agreed to allow on the ROW. Submission at 35 and 38.
4 and 5	**"Respondents spent a month discussing with TX DOT and EPA how to sample TX DOT property instead of putting an actual sampling plan into writing, despite EPA's request that sampling discussions start with a written draft sampling plan."**	Any suggestion that Respondents delayed in seeking or obtaining access from TxDOT to conduct sampling is not supported by the record. The discussions to which EPA refers occurred even before the AOC became effective and involved discussions of bona fide issues about the nature and scope of the sampling. Respondents provided EPA with a draft written sampling plan within days after EPA declined to have any discussions about the scope of the sampling until it could review a written plan. Appendix, Item 27 (TxDOT Chronology at 5-7) and Submission at 23.
5	**"Respondents took two additional weeks to amend a sampling only agreement."**	The "sampling only" agreement in question was circulated by TxDOT on June 11, 2010. At that time, Respondents were - at EPA's direction - continuing to seek a combined sampling and road access agreement. They therefore had incorporated provisions from TxDOT's "sampling only" agreement into a combined agreement. As they were preparing to send that draft to TxDOT's counsel, EPA

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		changed course and directed them in late June, to pursue a "sampling only" agreement. Respondents provided comments on the sampling only agreement within one day after EPA confirmed its direction was now to seek a sampling only access agreement. Appendix, Item 27 (TxDOT Chronology at 7-10) and Submission at 23-26.
5	**Respondents delayed in providing the TxDOT sampling results.**	Respondents requested that the samples be analyzed on an expedited basis, and made the validated sampling results available as soon as the results were received and reviewed by their consultant. The sampling plan for the TxDOT ROW, as approved by EPA, required the submission of validated data to EPA and TxDOT. Appendix, Item 27 (TxDOT Chronology at 10 and 14-15) and Submission at 26-28. While Respondents had preliminary unvalidated data earlier, they not only understood that EPA and TxDOT would only consider final validated data but the submittal of the validated data was required by the sampling plan approved by EPA and TxDOT. Appendix, Item 27 (TxDOT Chronology at 10).
5	**"Respondents waited two more weeks [after submitting the TxDOT sampling results] to discuss the sampling results with TX DOT and EPA."**	As soon as the sampling results were submitted, Respondents followed up with both TxDOT and EPA to discuss the results. TxDOT was not available to discuss the sampling results until October 14, 2010, two weeks later, but that was not due to delay on Respondents' part. Appendix, Item 27 (TxDOT Chronology at 16-19 and Submission at 29-30.
5	**Respondents caused delay in obtaining access from TxDOT by including a "turnaround" area in the final TxDOT access agreement.**	Including the turnaround area in the final agreement with TxDOT did not result in delay and it was necessary to address Respondents' inability to obtain access to the Big Star property.

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	"Respondents then proceeded with two weeks of negotiations ending with an agreement in principle with TX DOT for access. Respondents then expanded the scope of the access agreement they were seeking. Respondents spent two more weeks negotiating the expanded scope and have reached tentative agreement three weeks after stopping all work activities."	After TxDOT agreed to withdraw its demand for the indemnities for its own negligence, gross negligence and willful conduct, a final agreement that included the "turnaround area" was negotiated and signed within five business days. Including the "turnaround area" in the final agreement did not delay its consummation. Appendix, Item 27 (TxDOT Chronology at 35-37) and Submission at 38.
5	**"Respondents attempted to secure access from TX DOT for a laydown area for four months before deciding the Big Star property would be more appropriate."**	Respondents were not in a position to begin discussing with Big Star specifics regarding the use of its property for a Laydown Area until the technical alternative for the TCRA was selected by EPA and planning for its implementation had begun. That was in August 2010, when Respondents contacted Big Star regarding use of its property for a Laydown Area. Respondents had previously , in February 2010, included a laydown area in the "Consent to Access" entered into with Big Star, but this laydown area ultimately proved to be in an area of Big Star's property that was not adequate for the TCRA construction project. Respondents had begun discussions with TxDOT regarding an access agreement for a road in February 2010. Respondents included discussions of a laydown area at the same time in hopes of obtaining approval for as many activities as possible from TxDOT. As a result of these discussions with TxDOT in early 2010, Respondents knew that TxDOT, if it allowed access for a road, would impose significant limitations on any equipment storage and other activities on the ROW, and that those limitations together with the limited available space on the ROW, would preclude its use for a Laydown Area large enough to accommodate the needs of the project. Appendix, Item 28 (Big Star Chronology at 2) and Submission at 41-42.

PAGE(S)	STATEMENT(S)	WHY IT IS NOT CORRECT
5	**"Respondents attempted to secure access by informing Big Star that it is a liable party for the Site and should grant free use of its property despite the fact that further information is needed before liability can be determined including the completion of the RI/FS, which is several years away."**	Respondents did not attempt to secure access by "informing Big Star that it is a liable party," but Big Star's potential liability at the Site due to the dredging activities that it allowed to occur on its property that resulted in the release from the Site was relevant to that discussion. More than a year before, Respondents had provided EPA sufficient information on which Big Star's status as a PRP could be determined, and resubmitted that information to EPA in the course of the access negotiations. Respondents offered Big Star reasonable compensation in the form of rent for the use of its property for the period required by the TCRA (nine to 12 months). The reason they were unable to obtain access to the Big Star property was Big Star's unreasonable demands for a full release, indemnities and other obligations, in addition to rent. Appendix, Item 27 (Big Star Chronology at 17) and Submission at 44.
6	**"No sense of urgency to reach an agreement was displayed in Respondents' efforts and, in fact, Respondents spent the latter part of the month challenging EPA's position that access to conduct the TCRA Work was possible from the water."**	This conclusion is at odds with the entire record of Respondents' efforts to obtain access, both during December and previously. Appendix, Item 27 (TxDOT Chronology, Item 28 (Big Star Chronology, and Item 29 (Alternative Site Search Statement). EPA has improperly sought to dismiss many of the efforts made by Respondents during December to obtain access. Appendix, Item 31 (Respondents' Position Regarding December Access Efforts). TxDOT was only available to discuss access with Respondents on two days in December, and even in those discussions, was unwilling to consider withdrawing the objectionable indemnities that were one of the principle reasons for the impasse over access. Appendix, Item 27 (TxDOT Chronology at 30-33 and Submission at 35-37. During December, Big Star's counsel refused to have

PAGE(S)	STATEMENT(S)	WHY IT IS NOT CORRECT
		any discussions about access unless Respondents acceded to its demand for a full release and other terms as a condition of allowing Respondents to use the Big Star property for less than a year. Appendix, Item 28 (Big Star Chronology at 16-18) and Submission at 44. Furthermore, Respondents' efforts to further demonstrate why the work could not be done via the water only was in direct response to a statement by EPA's counsel that more complete information would be needed by EPA in order to consider Respondents' position that water only access was not technically viable and would result in significant delays.
6	**EPA's actions facilitated access negotiations.** "The EPA took progressive steps to facilitate the access negotiations between the Respondents and TX DOT. . . . All of these efforts by EPA helped move the negotiation process forward despite the unsuccessful efforts by Respondents in reaching an agreement with TX DOT prior to Respondents required Work activities."	Whatever steps EPA may have taken, they cannot be fairly characterized as having been steps to "facilitate the access negotiations." EPA's actions at every turn impeded those efforts, as documented in Respondents' January 5, 2011 Letter. See Appendix, Item 18 (January 5, 2011 Letter) and Submission at 46-47. Moreover, EPA never took action to incentivize Big Star to work cooperatively with Respondents in accomplishing the TCRA work.
8	**"On November 30, 2010, EPA counsel did not ask TX DOT to submit in writing a signed access agreement. In fact, the EPA Region 6 Superfund Division Director asked for this at the November 18, 2010. meeting between EPA, TX DOT, and Respondents."**	Respondents never contended that this request was made on November 30, 2010. Respondents' counsel learned of EPA's request on November 29, 2010, during a call with TxDOT's counsel. None of the participants for Respondents in the November 18, 2010 meeting recall this request having been made during the meeting, and on Respondents' side, they had no knowledge of EPA's request until November 29, 2010. Appendix, Item 27 (TxDOT Chronology at 25-26) and Submission at 34.

PAGE(S)	STATEMENT(S)	WHY IT IS NOT CORRECT
7	**EPA did not "approve" the terms demanded by TxDOT and Big Star.** "In a December 8, 2010, email, EPA's counsel did not state that EPA "approves" TX DOT language, rather EPA counsel stated 'EPA has already conveyed to TX DOT agreement with the TX DOT language (6b, I0b, and I0c) in the license agreement, on Monday. . . ."	As addressed in the Submission, EPA acknowledges that it "conveyed agreement" of the TxDOT terms and does not explain why that is not the equivalent of having "approved" them and has never, to Respondents' knowledge, disapproved of the release, indemnities and remediation obligations, in addition to rent, that Big Star demanded. Appendix, Item 27 (TxDOT Chronology at 30-31) and Item 28 (Big Star Chronology at 19).
7	**"In June 2010, EPA's counsel does not recall making a statement that Respondents' position was 'reasonable' that they don't indemnify TX DOT as well as remediation. EPA's counsel does recall that she agreed with Respondents that it is 'reasonable' for Respondents to include the sampling plan in the access agreement for the road on TX DOT property."**	The recollection of Respondents' counsel regarding the call in which this statement was made by EPA's counsel is set forth in the January 5, 2011 Letter. Appendix, Item 18 (January 5, 2011 Letter at 12). Outside counsel for both Respondents are prepared to provide declarations on this point.
7 – 8	**"There is no access agreement between EPA and TX DOT for the Van der Horst Superfund Site."**	Respondents were not informed prior to receiving the February 16 Letter that this agreement, which they had been informed by EPA over a period of months apparently existed, in fact did not exist. Submission at 33-34. It is not the case that this agreement is "irrelevant," as stated in EPA's comments on Respondents' December access efforts. The terms to which EPA itself would agree in obtaining access from TxDOT are highly relevant to whether the terms TxDOT was demanding from Respondents were reasonable and appropriate. *Id.*
8	**No statements were made by the TCRA RMP at the November 16, 2010 technical**	The description of this meeting in Respondents' January 5, 2011 Letter is based on the recollection of participants in the

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	meeting suggesting that water only access was not a viable option. "On November 16, 2010, EPA's RPM acknowledged that there are technical issues with access via water. The EPA's RPM did not state that land access is critical and was not willing to put it in writing." "The EPA's RPM also did not state that it would be okay to remove water-only access from consideration due to health and safety and environmental concerns." "The EPA's RPM also did not recommend to Respondents to elevate their concerns regarding water access to the EPA Region 6 Superfund Division Director."	meeting and contemporaneous notes. See Appendix, Item 18 (January 5, 2011 Letter at 5) and Item 13 (Meeting Notes). Respondents are prepared to submit declarations from the participants in the meeting to support the description of the meeting set forth in the January 5, 2011 Letter and the participants' recollection as to statements made by EPA's TCRA Project Coordinator during that meeting.

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APPENDIX TO SUBMISSION OF RESPONDENTS MCGINNES INDUSTRIAL MAINTENANCE CORPORATION AND INTERNATIONAL PAPER COMPANY IN RESPONSE TO LETTER DATED FEBRUARY 16, 2011 AND IN SUPPORT OF *FORCE MAJEURE* CLAIM AND CLAIM FOR INTERFERENCE WITH AND BREACH OF CONTRACT[1]

September 9, 2011

VOLUME I

ITEM	DATE	DESCRIPTION
1	--	Map of the waste impoundments and surrounding properties (including the TxDOT ROW and the Big Star property)
2	December 18, 2009	Respondents' letter regarding "best efforts" to obtain access under the UAO
3	January 15, 2010	Respondents' letter regarding "best efforts" to obtain access under the UAO
4	February 16, 2010	Respondents' letter regarding "best efforts" to obtain access under the UAO (February 16, 2010 UAO Best Efforts Letter)
5	June 1, 2010	Respondents' letter regarding "best efforts" to obtain access under the AOC (June 1, 2010 Best Efforts Letter)
6	July 1, 2010	Respondents' letter regarding "best efforts" to obtain access under the AOC (July 1, 2010 Best Efforts Letter)

[1] Capitalized terms used in this document and not otherwise defined have the same meaning as in the Submission and related document of which this Appendix is a part

VOLUME II

ITEM	DATE	DESCRIPTION
7	July 30, 2010	Respondents' letter regarding "best efforts" to obtain access under the AOC (July 30, 2010 Best Efforts Letter)
8	September 30, 2010	Respondents' letter regarding "best efforts" to obtain access under the AOC (September 30, 2010 Best Efforts Letter)
9	October 18, 2010	EPA letter regarding revisions to RAWP (EPA October 18, 2010 Letter)
10	November 1, 2010	Respondents' letter regarding "best efforts" to obtain access under the AOC (November 1, 2010 Best Efforts Letter)
11	November 1, 2010	Respondents' letter objecting to changes required by EPA to RAWP and selected portions of RAWP submitted to EPA on the same date
12	November 12, 2010	Respondents' letter responding to November 2, 2011 letter from EPA regarding access issues under the AOC (November 12, 2010 Letter)
13	November 16, 2010	Meeting notes

VOLUME III

ITEM	DATE	DESCRIPTION
14	November 30, 2010	Respondents' letter regarding "best efforts" to obtain access under the AOC (November 30, 2010 Best Efforts Letter)

VOLUME IV

ITEM	DATE	DESCRIPTION
15	December 30, 2010	Respondents' *force majeure* notice (December 30, 2010 *Force Majeure* Notice)
16	January 4, 2011	MIMC letter regarding *force majeure* notice (MIMC January 4, 2011 Letter)

ITEM	DATE	DESCRIPTION
17	January 4, 2011	International Paper letter joining in MIMC January 4, 2011 letter
18	January 5, 2011	Respondents' letter regarding access under the AOC and *force majeure* note (January 5, 2011 Letter)
19	January 14, 2011	EPA notice of violation ("NOV") letter
20	January 21, 2011	EPA NOV letter
21	January 24, 2011	EPA NOV letter
22	January 28, 2011	Respondents' letter supplementing *force majeure* notice (January 28, 2011 Letter)
23	February 14, 2011	Respondents' notice of dispute regarding January 14, 2011 NOV
24	February 22, 2011	Respondents' notice of dispute regarding January 21, 2011 and January 24, 2011 NOVs
25	March 3, 2011	EPA NOV letter
26	April 4, 2011	Respondents' notice of dispute regarding March 3, 2011 NOV

VOLUME V

ITEM	DESCRIPTION
27	TxDOT Chronology (including TxDOT Chronology Exhibits 1 to 44)

VOLUME VI

ITEM	DESCRIPTION
28	Big Star Chronology (including Big Star Chronology Exhibits 1 to 19)
29	Alternative Site Search Statement
30	Technical Response

ITEM	DESCRIPTION
31	Respondents' Position Regarding December Access Efforts
R1	November 15, 2010 TCRA Weekly Report No. 1 (November 8-12, 2010)
R2	November 22, 2010 TCRA Weekly Report No. 2 (November 15-19, 2010)
R3	November 29, 2010 TCRA Weekly Report No. 3 (November 22-26, 2010)
R4	December 6, 2010 TCRA Weekly Report No. 4 (November 29 – December 3, 2010)
R5	December 13, 2010 TCRA Weekly Report No. 5 (December 6-10, 2010)
R6	December 20, 2010 TCRA Weekly Report No. 6 (December 13-17, 2010)
R7	December 27, 2010 TCRA Weekly Report No. 7 (December 20-24, 2010)
R8	January 3, 2011 TCRA Weekly Report No. 8 (December 27-31, 2010)
R9	January 10, 2011 TCRA Weekly Report No. 9 (January 3-7, 2011)
R10	January 17, 2011 TCRA Weekly Report No. 10 (January 10-14, 2011)
R11	January 24, 2011 TCRA Weekly Report No. 11 (January 17-24, 2011)
R12	January 31, 2011 TCRA Weekly Report No. 12 (January 24-28, 2011)
R13	February 7, 2011 TCRA Weekly Report No. 13 (January 3 - February 4, 2011)